BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

WESTERN WASHINGTON REGION

STATE OF WASHINGTON

FUTUREWISE, GOVERNORS POINT DEVELOPMENT COMPANY, TRIPLE R. RESIDENTIAL CONSTRUCTION, INC. AND THE SAHLIN FAMILY, ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS AND DAVID STALHEIM, AND CITY OF BELLINGHAM, Petitioners, v. WHATCOM COUNTY, Respondent.	**CASE NO. 11-2-0010c** **FINAL DECISION AND ORDER** **CASE NO. 05-2-0013** **ORDER FOLLOWING REMAND ON ISSUE OF LAMIRDS**

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SYNOPSIS

This Order addresses challenges to Whatcom County Ordinance No. 2011-013 which adopted amendments to the County's Comprehensive Plan and development regulations pertaining to Limited Areas of More Intensive Rural Development (LAMIRDs) and rural development.

In this Order the Board finds that in revising its rural element, the County has violated RCW 36.70A.070(5)(c) by failing to include adequate measures within the Rural Element of its Comprehensive Plan to protect the rural character. In addition, the Board finds that the County has violated RCW 36.70A.070(5)(d) in that its development regulations for LAMIRDs fail to provide that the development permitted in LAMIRDs be based on the existing area or

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existing use as of July 1, 1990. The Board finds these provisions to be invalid. Certain of the LAMIRDs described in detail in the following Order are found to be oversized or improperly established adjacent to a UGA and, as development within these LAMIRDs would substantially interfere with the goals of the GMA, they are found to be invalid.

In reviewing amendments of the County's Comprehensive Plan Policies, the Board did not find that the County improperly used precatory language, except in those policies where such language undercut a GMA mandate.

In this Order the Board finds that the County has created an inconsistency between the population allocation to the rural areas allowed by the County's development regulations and the allocation elsewhere provided for in the Comprehensive Plan.

The Board finds that the County failed to properly coordinate with the City of Bellingham and other service providers with respect to water service and fire protection services required by the new rural land use provisions.

Finally, the Board finds that the application of the Rural Residential Density Overlay (RRDO) in the Lake Whatcom Watershed is inconsistent with Plan Goal 2MM and Policy 2MM-1 as it fails to minimize development in the Lake Whatcom area.

I. PROCEDURAL BACKGROUND

Remand from the State Supreme Court

In 2005 the Board issued a Final Decision and Order in the case of *Futurewise v. Whatcom County*, WWGMHB case No. 05-2-0013. In that order the Board found, *inter alia,* that the County's LAMIRD criteria were non-compliant with the GMA.

An appeal of the 2005 FDO decision was filed in Whatcom County Superior Court. As described by the Supreme Court:

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> Gold Star**,** but not the County, petitioned for review by Whatcom County Superior Court. The superior court held that the Board incorrectly required the County to revise its LAMIRDs and rural densities. The court concluded that the GMA does not require that comprehensive plans be amended to comply with current GMA requirements; rather, RCW 36.70A.130(1) "requires that counties review and evaluate their comprehensive plans and development regulations 'indentifying the revisions made, or that a revision was not needed and the reasons therefore.' " CP at 115. The court additionally ruled that "[t]he LAMIRDs were the subject of prior litigation and were affirmed by" both the superior court and the Court of Appeals in 1998. *Citations omitted.* Finally, the court held that the Board also improperly used a bright line rule of one residence per five acres when deciding the rural density challenge.
>
> Futurewise appealed, and the Court of Appeals reversed. The Court of Appeals first rejected Gold Star's claim that *res judicata* or collateral estoppel principles barred Futurewise's challenge to the County's plan provisions regarding more intense development in the rural areas. The Court of Appeals then held that the GMA's review statute requires a county "to amend its comprehensive plan as necessary to comply with GMA amendments that came after adoption of the plan." *Citation omitted*.The court affirmed the Board's holdings that the County had not applied proper criteria in establishing its areas of more intense rural development and that the County's comprehensive plan was not compliant with the GMA's LAMIRD provisions. The Court of Appeals also reversed the superior court's ruling on the "bright line rule" of rural density.[1]

Gold Star sought discretionary review by the State Supreme Court, which issued its decision on December 17, 2009. The Supreme Court affirmed the Court of Appeals' decision upholding the Board's holdings that the County's comprehensive plan does not comply with the GMA's LAMIRD provisions and that the County was required, but failed, to revise the plan to include the LAMIRD criteria and then apply them in establishing areas of more intense rural development.

The Court reversed the Court of Appeals' holding that the Board did not improperly apply a bright line rule in addressing Futurewise's challenge to the rural density designations and

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[1] *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 732, 222 P.3d 791 (2009).

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held that the Board did in fact rely on a bright line rule of one residence per five acres in rural areas (other than LAMIRDs).

The Court found that the County must revise its comprehensive plan to conform to the LAMIRD provisions of the GMA and then apply the statutory criteria to establish appropriate areas of more intensive rural development.

An order from Whatcom County Superior Court was issued on May 4, 2010 mandating this matter to the Board for proceedings consistent with the Supreme Court's decision.

As directed by our State Supreme Court:

> Accordingly, this matter is remanded to the Board for reconsideration of Futurewise's challenges to the rural density designations without applying a bright line rule. In addition, the County must revise its comprehensive plan to conform to the LAMIRD provisions of the GMA and then apply the statutory criteria to establish appropriate areas of more intensive rural development. As noted, it is possible that some of the County's existing areas of more intense development will be found to conform to the statutory criteria. But these criteria must be incorporated into the comprehensive plan and then applied before any such determinations can be made. As we have noted in this opinion, the county has evidently already begun the process of reassessing its areas of more intense rural development.[2]

New Petitions for Review

Following the County's adoption of Ordinance 2011-013 to address the LAMIRD issues, four separate Petitions for Review (PFR) were filed with the Board, challenging various aspects of that ordinance. As the Board noted in its letter of July 15, 2011 to the parties:

> Based on the need to consider the new challenges to Ordinance 2011-013, while also addressing it in the scope of a compliance proceeding, the Board has decided that the Compliance Hearing on the 26th will consider only the rural densities portion of the remand. The LAMIRD remand compliance proceedings will now be coordinated with appeal proceedings for the four PFRs challenging

[2] 167 Wn.2d at 740

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Ordinance 2011-013 and the Board will issue a Compliance Order/FDO at that end of those proceedings.

Thus, this matter is now before the Board to review not only the County's compliance efforts with regard to its LAMIRDs, but additional issues raised in the new PFRs.

Motions

On May 10, 2011 the Board granted David Stalheim, Laura Leigh Brakke, Wendy Harris and Eric Hirst permission to participate in the portion of the remand of case 05-2-0013 regarding the County's LAMIRD criteria. In this capacity, these parties are referred to as "Participants" in this Order.

Hearing on the Merits

The Hearing on the Merits was held on November 21, 2011, in Bellingham, Washington. Board members Nina Carter, Margaret Pageler and James McNamara, were present; Board Member McNamara presiding. Petitioners Governors Point Development Company, Triple R Residential Development, Inc. and the Sahlin Family were represented by Dannon Traxler; Petitioners Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim[3] were represented by Jean Melious; Petitioner Futurewise was represented by Tim Trohimovich; Petitioner City of Bellingham was represented by Tom Ehrlichman and Barbara Dykes; Whatcom County was represented by Karen Frakes and Lesa Starkenburg-Kroontje.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[4] This presumption creates a high

[3] Referred to in this Order simply as Hirst.
[4] RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

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threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the County is not in compliance with the GMA.[5]

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[6] The scope of the Board's review is limited to determining whether a County has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[7] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[8] The Board shall find compliance unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[9] In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[10]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[11] However, the

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[5] RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.
[6] RCW 36.70A.280, RCW 36.70A.302
[7] RCW 36.70A.290(1)
[8] RCW 36.70A.320(3)
[9] RCW 36.70A.320(3)
[10] *City of Arlington v. CPSGMHB,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).
[11] RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the

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County's actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.[12]

Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the challenged action taken by the County is clearly erroneous in light of the goals and requirements of the GMA.

III. BOARD JURISDICTION

The Board finds that the Petitions for Review were timely filed, pursuant to RCW 36.70A.290(2). The Board finds that the Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

IV. PRELIMINARY MATTERS

In its Response to Objections to a Finding of Compliance, the County noted the scope of the remand from the Supreme Court as it applied to LAMIRDs. The County correctly pointed out that the portion of this case that is at issue in the compliance proceeding has been limited to the County's Comprehensive Plan policies and designation criteria related to LAMIRDs, and the mapping of the LAMIRDs on Map 8 in the Plan.[13] The issue of use regulations is not within the scope of the remand and those issues will not be considered, except as raised in the new PFRs.

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ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

[12] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish,* 161 Wn.2d at 423-24. In *Swinomish,* as to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. *Id.* at 435, Fn.8.

[13] County Response to Objections to a Finding of Compliance, at 2-3.

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V. ISSUES AND DISCUSSION

LAMIRD Criteria on Remand

Following remand from the Supreme Court, the County reported that it adopted Ordinance No. 2011-013 on May 10, 2011 which amended the Whatcom County Comprehensive Plan text and maps consistent with the requirements of RCW 36.70A.070(5)(d).[14] Both Futurewise and Participants filed objections to the County's compliance report.

Much of Futurewise's objection relates to rural densities permitted in the County rural areas. In particular, Futurewise focuses on densities of one and two dwelling units per acre.[15] As these arguments were raised and addressed in the Board's consideration of rural densities on remand, they need not be considered again here.[16]

With regard to the County's LAMIRDs, Futurewise argues that the Birch Bay, Lynden Valley & Valley View, Eliza Island, Fort Bellingham/Marietta, Kendall, and Point Roberts LAMIRDs do not comply with the GMA. Those issues were raised by Futurewise again in the new PFRs and will be addressed in the portion of this order addressing specific County LAMIRDs.

Futurewise also raises objections to various aspects of the County's LAMIRD regulations, as set forth below.

While Futurewise argues that Policies 2GG-2 and 2GG-3 do not comply with the GMA because they allow lots as small as one acre in the rural areas, such a challenge is outside the scope of the compliance proceeding. As the County points out, Policy 2GG-3 does not deal with LAMIRDs and although Policy 2GG-2 does mention LAMIRDs, it is the language relating to rural density that is challenged.

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[14] County Compliance Report, Case No. 05-2-0013, at 1-2.
[15] See, Futurewise Objection to Compliance – LAMIRD Provisions, 2-17.
[16] See, *Futurewise v. Whatcom County*, WWGMHB No. 05-2-0013, Order Following Remand from the Supreme Court, 9/9/11.

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The County points out, and the Board agrees, that Futurewise has not provided argument in support of a challenge to Policies 2JJ-5, 2LL-4 or 2NN-7[17], but merely references them in its issue statement. Futurewise's challenge to these Policies on remand does not demonstrate non-compliance.

Other Policies at issue, 2HH-1, 2HH-2, 2HH-3 are also raised in the Petitions filed in case no. 11-2-0010c, and therefore will be addressed below.

Zoning Code Provisions

Futurewise raises challenges to various zoning code provisions contained in WCC 20.59, 20.60, 20.61, 20.63, 20.64, 20.67, and 20.69.[18] In response, the County argues that the remand portion of this case has never been about the uses allowed in LAMIRDs by the zoning code, and it cannot be transformed into such in the compliance phase. The County notes that while it did adopt new regulations for uses within its LAMIRDs as part of its rural element update, it did not do so in response to a finding of noncompliance on its comprehensive plan provisions related to LAMIRDs. Any challenge to such regulations would have to be raised in a new petition.[19] The Board agrees. So too, apparently does Futurewise, as it has repeated its arguments regarding these provisions of the WCC almost verbatim in its opening brief in case No. 11-2-0010c. The Board will address those challenges within the scope of the issues raised in Futurewise's PFR, as they are not properly raised in case No. 05-2-0013.

Conclusion: Futurewise's challenges to WCC 20.59, 20.60, 20.61, 20.63, 20.64, 20.67, and 20.69 are not properly before the Board in the compliance portion of case no. 05-2-0013 but will be addressed as raised in the PFR filed in case no. 11-2-0010c.

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[17] The County correctly points out that Policies 2LL-4 and 2NN-7 do not even exist in the amended Comprehensive Plan. County Response at 14.
[18] See, Futurewise Objections to Compliance - LAMIRD provisions, 23-29.
[19] County Response to Objections at 3.

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Participants' SEPA and Public Participation Challenges on Remand

The Board addresses the Participants' SEPA and public participation challenges in the portion of this order dealing with the issues raised in case no.11-2-0010c.

ISSUES RAISED IN CASE 11-2-0010c

A. Public Participation

GPDC Issue 4: *Did the County's adoption of the Ordinance fail to comply with the public participation requirements of RCW 36.70A.020(11) and 36.70A.140 when it failed to allow the County Planning Commission the ability to review and comment on County Council-implemented revisions to the County's zoning code adopted with the Ordinance, and County Comprehensive Plan constructs like residential overlays, and attempted to prevent the public from testifying to such revisions during the Planning Commission's public hearing on April 25, 2011?*

GPDC Issue 5: *Did the County's adoption of the Ordinance fail to comply with the public participation requirements of RCW 36.70A.020(11) and 36.70A.140 when it failed to consider or respond to any of the testimony, both oral and written, submitted by representatives of Petitioners in support of designating the Chuckanut area including Governors Point as a LAMIRD, choosing instead to exclude and downzone the area based purely on political reasons?*

Hirst Issue 9: *Did the County's adoption of the Ordinance fail to comply with case law and with RCW 36.70A.140 and RCW 36.70A.070 (preamble), requiring early and continuous public participation?*

Bellingham Issue 10: *Did the amendments violate the GMA's public participation requirements, under RCW 36.70A.020(11), .070 (preamble), .140, the County's adopted public participation plan, and the public participation requirements of SEPA, including but not limited to the requirements of WAC 197-11-030(2)(f), -055(6), -230(2)(b), 4, -340(2)(c), 3(a)(ii), -502, -510, -535, because, among other things:*

a. *After October 2009 there was little if any public participation concerning the proposal, until a substantially new package of amendments was introduced on March 7, 2011, just prior to a public hearing on March 9, and again at the end of March, immediately prior to the March 29 public hearing, without affording the public or affected agencies, including the City, the time necessary to analyze the effects of the changes or provide studies quantifying those impacts;*

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b. *The County did not conduct a SEPA public process for public review on any of the changes;*
c. *The late delivery of amendments to the Planning Commission and the schedule for its review imposed by Council in its transmittal afforded the Commission no more than one day to hold a public hearing and deliberate prior to sending a recommendation to the Council;*
d. *The Planning Commission improperly took a straw vote after a briefing by staff, pre- deciding the matter prior to holding a public hearing; and*
e. *The County Council held a public hearing on an outdated version of the ordinance, which did not include any notice of or text reflecting the Planning Commission's recommended changes, thus requiring the Council to renote and hold a second public hearing that precluded comment on anything other than the Planning Commission changes; and as a result, the proposal was piecemealed and the public never got an opportunity to understand the full scope of the proposal before the County in a single public hearing before the County Council?*

Discussion

Planning Enabling Act

Participants and some Petitioners including the City of Bellingham assert that the County violated its own public participation plan by failing to hold a Planning Commission hearing on the Council's revised Zoning Code provisions. Participants also argue that the County violated the public participation requirements of the Planning Enabling Act (RCW 36.70) in that the Planning Commission failed to support its recommendations with findings of fact (RCW 36.70.400). [20]

In response to allegations that the County failed to comply with RCW 36.70, the Planning Enabling Act (PEA), the County asserts this Board does not have jurisdiction over these issues in this case because, unlike in the Jefferson County case the parties refer to,[21] there is no evidence that Whatcom County has specifically incorporated compliance with the PEA into its GMA public participation program.

[20] Participants' Objections at 24.
[21] *See*, *Brinnon Group v. Jefferson County*, WWGMHB No. 08-2-0014, Final Decision and Order (9/15/2008).

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Nevertheless, the County maintains it *did* comply with requirements of the PEA. As provided for by RCW 36.70.430, the Planning Commission's 2011 review was limited to Comprehensive Plan provisions. That statute states as follows:

> When it deems it to be for the public interest, or when it considers a change in the recommendations of the planning agency to be necessary, the board may initiate consideration of a **comprehensive plan, or any element or part thereof, or any change in or addition to such plan or recommendation**. The board shall first refer the proposed plan, change or addition to the planning agency for a report and recommendation. Before making a report and recommendation, the commission shall hold at least one public hearing on the proposed plan, change or addition. Notice of the time and place and purpose of the hearing shall be given by one publication in a newspaper of general circulation in the county and in the official gazette, if any, of the county, at least ten days before the hearing. *(Emphasis added.)*

The County points out that Petitioners argue that all of the Council changes, including zoning amendments, should have been returned to the Planning Commission, yet official controls, such as zoning amendments, are not within the purview of this statute. It argues that when the Council wants to change a recommendation from the Planning Commission pertaining to an official control, RCW 36.70.630 is applicable and that requires that the Council have its own additional hearing. Consistent with this, the County's Public Participation Plan states as follows:

> County Council will review the recommendation of the Planning Commission and hold a work session in committee. The Council will approve the recommendation, modify, or deny. If the Planning Commission recommendation is modified, another hearing will be held on that modification and then the Council will act. [22]

The Board finds that there is no competent evidence that the County chose to subject itself to the public participation requirements of the Planning Enabling Act, or as in *Brinnon Group v. Jefferson County,* incorporate the PEA into its GMA public participation program.

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[22] Ex. D-015 (Public Participation Plan), pp. 4-3-4-4.

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Petitioners can point to only one reference to the PEA in the record. In Section 4.1 of the County's public participation program it is noted:

> The Washington Administrative Code (WAC) provides guidelines and rules for public involvement in comprehensive planning. WAC 365-196-600 "Public Participation" states that "The public participation program should clearly describe the role of the planning commission, ensuring consistency with requirements of chapter 36.70, 35.63, or 35A.63 RCW."

This provision does not establish that the County is subject to the PEA; it is merely a reference to a Washington Administrative Code provision that in turn references the PEA. Therefore the Board has no jurisdiction to consider allegations that Whatcom County violated the Planning Enabling Act.

GMA Public Participation

"Early and Continuous Public Participation"

Hirst argues that the County failed to provide any opportunity for public comment during the period from October 2009 to March 2011 when the Ordinance was being developed and that, when the Council did hold a public hearing, it provided the public with only 48 hours to view the entire proposal, thus depriving the public of adequate time for review.[23] It argues that during the March 14 and 15, 2011 work sessions there was no opportunity for public comment and during those sessions the County made significant changes to the proposal. When the County referred the Comprehensive Plan changes to the Planning Commission for additional review, Hirst argues that the Planning Commission process was flawed, as it was an accelerated review and included a "straw vote" prior to formal approval. Hirst argues that the Planning Commission failed to support its recommendations with findings of fact or reasons, as required by RCW 36.70.400.[24]

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[23] Hirst Brief at 83.
[24] As to compliance with RCW 36.70, the Planning Enabling Act, see above.

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As Participants[25] in the compliance proceedings, Hirst also maintains that the County's process of revising the Planning Commission's proposal without any public participation, between October 2009 and March 2011, violated GMA's requirement for "continuous" public participation.[26]

The City likewise alleges that there was little, if any, public participation after October 2009 until notice of a substantially new package of amendments was published on March 7, 2011. It asserts that the proposal was changed again just prior to a public hearing on March 9, and again on March 14 and 15. It asserts that these last minute changes were made without adequate notice or an opportunity to study the changes, and that the public was thus not afforded an opportunity to analyze their effects.

The County contests these assertions, stating that between the 2009 Planning Commission recommendations and the final adoption of Ordinance No. 2011-013 in May of 2011 Whatcom County Planning and Development Services (PDS) sent 41 notifications to those on its e-mail notification list updating recipients on upcoming open meetings of the County Council, staff memorandums, and recent changes to drafts.[27] During this period it received 278 public comments.[28] The County relates that between January and July 2010 the County Council's Planning and Development Committee and Special Committee of the Whole met in open sessions to discuss the 2009 Planning Commission recommendations and that it published a revised draft based on Council discussions which was posted September 7, 2010 on the County website with notification of this posting sent to the e-mail notification list.

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[25] Hirst et al. filed briefing both as Participants in the compliance phase of case no. 05-0-0013 and as Petitioners in case no. 11-2-0010c. References to Hirst et al. as Participants make reference to their submittals in case no. 05-2-0013 which was coordinated with the hearing on the new appeals.
[26] Participants' Objections at 23.
[27] County Response to Objections at 4.
[28] Id.

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The Board does not find that the Participants or Petitioners have met their burden to demonstrate that the County has violated RCW 36.70A.140's requirement to employ a public participation program that provides for "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations". Findings of Fact 36 – 70 of the Ordinance detail the County's public participation efforts. The most current drafts of all comprehensive plan text and maps, zoning code text and maps were available on the County's website, continually, from the time the first draft was posted in June 2009 until the adoption of the Ordinance in May of 2011. In addition, the County provided e-mail notification of new revisions to hundreds of interested parties[29] as those changes were posted on the website.

While Governors Point Development Company (hereafter "GPDC") argues that meaningful public participation was precluded when the Council voted on the exclusion of the Chuckanut area from a LAMIRD at a work session and prohibited counsel for GPDC to speak to this issue, it has not established that this foreclosed other opportunities for comment. Instead, in addition to the work sessions, the County Council held four public hearings on the Ordinance. Despite claims that the County provided only 48 hours notice of the proposal, it appears that there were subsequent public hearings as to which there were no allegations that too short notice was provided. Indeed, in the final two months from March 7, 2011, when the County Council draft ordinance was circulated, to May 11, 2011, when the Ordinance was adopted, the record indicates the County invited and considered significant public input. The Board concludes that there was substantial opportunity for public participation during the period while the Ordinance was being considered.

Involvement of the City of Bellingham

Hirst and Participants argue that the County violated its own public participation plan which provides that the County will engage with cities on issues that need to be reconciled. The

[29] Ex. N-001

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County argues that it made repeated efforts to engage the City of Bellingham and the City was on the e-mail notification from the beginning of the process until the very end. When the City contacted the County, it responded quickly and thoroughly, the County claims.[30]

The Board does not find that the challengers have carried their burden to establish a violation of GMA public process requirements with regard to involving the City of Bellingham in this process. [31] The County made repeated efforts to engage the City of Bellingham as indicated by the fact that the City was on the County's e-mail notification list and that the County promptly responded to City enquiries.[32]

Scope of Planning Commission Review

GPDC argues that the County violated RCW 36.70A.140 and acted contrary to RCW 36.70A.020(11) by failing to allow the Planning Commission to review and comment on Council-implemented revisions to the County's zoning code and attempting to prevent the public from testifying on such revisions at the Planning Commission's April 25, 2011 public hearing.[33] Instead, the Planning Commission review was restricted to Comprehensive Plan amendments. Consequently, GPDC argues, the Planning Commission could not be assured its recommendations would be consistent with the Council's Plan amendments.[34]

Hirst too argues the public participation plan requires the Planning Commission to hear amendments to the Whatcom County Code, yet no Planning Commission hearing was held on the revised zoning code provisions.

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[30] County Response to Objections at 11.
[31] While the Board does not find a violation of GMA's public participation requirements, with regard to the City of Bellingham, elsewhere in this Order the Board finds that the County failed to adequately consult and coordinate with the City, in violation of RCW 36.70A.100 and inconsistent with Comprehensive Plan policies.
[32] Ex. N-051 and N-019.
[33] GPDC Brief at 14.
[34] Id. at 15.

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While these parties argue that the Planning Commission should have reviewed all of the County Council's revisions, RCW 36.70.430, upon which Participants rely, and which the Board has determined it lacks authority to review, addresses only comprehensive plan amendments. Thus, Planning Commission review of the Council's modification to zoning regulations was not required by the statue.

More on point, it is far from clear that the County's own public participation program requires County Council modifications to be returned to the Planning Commission. Section 4.3.1(5) and 4.4.1(8) of that program each provide:

> **County Council:** County Council will review the recommendation of the Planning Commission and hold a work session in committee. The Council will approve the recommendation, modify, or deny. If the Planning Commission recommendation is modified, another hearing will be held on that modification and then the Council will act.

These sections do not provide, as Petitioners assert, that the body that conducts "another hearing" is the Planning Commission, rather than the County Council. Therefore, Petitioners have not demonstrated clear error in this regard.

Response to Public Comments

RCW 36.70A.140 provides that a public participation program shall provide for consideration of and response to public comments. GPDC argues that the Council failed to consider or respond to oral or written testimony from GPDC in support of designating the Chuckanut area a LAMIRD. The Board notes that County wide Planning Policy A.4 states:

> Citizen comments and viewpoints shall be incorporated into the decision-making process in development of draft plans and regulation. Consideration of citizen comments shall be evident in the decision-making process.

It is evident from the record that the County considered comments from GPDC's counsel regarding the 1990 built environment for Governors Point as well as the impact the County's

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decision would have on property rights. This is demonstrated by the fact that the Chuckanut area, including Governors Point, was proposed as a Type I LAMIRD in early drafts.[35]

There was considerable testimony about the proposal, with GPDC's counsel testifying at many meetings and others objecting, based primarily on traffic and access impacts along the narrow road, but also landslide hazards.

At the March 1, 2011 Committee of the Whole meeting[36], the County Council considered the staff proposal for an overlay zone for Chuckanut versus a Type I LAMIRD. The Council voted to designate the Chuckanut area a LAMIRD. GPDC's representative testified as well as several neighbors – discussion included water lines, traffic hazards, landslides, vested rights. GPDC's representative also testified in favor of the LAMIRD designation at the subsequent public hearing.[37] On March 10 the County Executive sent a letter to the Council[38] objecting to (a) size of Birch Bay/Lynden LAMIRD, (b) LAMIRD designation for Governors Point, and (c) maximum building sizes in rural commercial/industrial designation. The County Executive stated: "Please be assured I share Council's belief in and support of property rights." As to Governors Point, the Executive stated:

> In 1990 and still today, only a handful of residences exist on this approximately 125 acre peninsula. The area remains essentially undeveloped and does not meet the criteria for "built environment."

GPDC promptly wrote the County Council noting "the extensive documentation submitted to the Council, depicting Governors Point's built environment which includes water lines in place since the 1950's and 60's as well as road, power lines and phone lines."[39]

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[35] Ex. M-028 - Whatcom County Council Committee of the Whole (June 22, 2010) "Discussion – the hazards of Chuckanut Drive, the status of a vested plat at Governor's Point."
[36] Ex. M-103, p 4-5
[37] Ex. M-011
[38] Ex. R-009
[39] Ex. C-114, 3/11/2011

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At its meeting on March 14, 2011, the Council voted to remove the Chuckanut area from LAMIRD designation.[40] The agenda for this meeting was "Discussion of Public Testimony Received … and Preparation of a Draft Ordinance."

The Draft Ordinance was introduced April 26, 2011. GPDC promptly objected[41] stating the planning department:

> … never changed the Chuckanut area map to show the built environment. Planning staff does not have the discretion to determine that some built environment (in this case, 5000 lineal feet of waterline in place since 1954 served with City of Bellingham water) is simply not worth presenting to the council, but they did it anyway. County-inspected roads construction is also completely overlooked.

The Staff LAMIRD Report, updated April 29, 2011,[42] provided the information requested by GPDC. The LAMIRD Report includes a section on Affected Areas with no LAMIRD Designation – including Chuckanut. The Chuckanut analysis states, in relevant part,

> On several jointly-owned parcels on the Governor's Point peninsula a pending subdivision application for 141 lots is vested. A water line and a series of roads had been built across the parcels by 1990, but the residential subdivision was not developed, and additional infrastructure on the parcels is limited to a water line, electric line, and telephone line that serve a neighboring residence (a second water line serving a second neighboring residence is no longer in use).

Therefore it is clear the updated LAMIRD Report responded to and incorporated GPDC's input about the built environment. As to consideration of GPDC's property rights assertion, the Ordinance makes a number of findings/conclusions demonstrating the Council took claims of property rights into consideration.[43]

Conclusion: The Board finds and concludes that the County has not adopted the provisions of RCW 36.70, the Planning Enabling Act as part of its public participation

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[40] Ex. M-010, at 2
[41] Ex. C-013
[42] Ex. R-001, at 80
[43] See e.g., Finding 5, Conclusions 3.h and 7

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program. Therefore, the Board has no jurisdiction to determine compliance with that statute. The Board further finds and concludes that the County complied with the public participation requirements of the GMA.

B. SEPA

Hirst Issue 8: *Did the County's adoption of the Ordinance violate case law, the State Environmental Policy Act ("SEPA"), particularly RCW 43.21C.031, and implementing SEPA policies, including WAC 197-11-055(2), WAC 197-11-060(3)(a), WAC 197-11-600(3)(b)(i), and WAC 197-11-784 because the County failed to conduct the new threshold analysis required by SEPA?*

Bellingham Issue 7: *Did the amendments violate the requirements of GMA and the procedural and substantive requirements of SEPA, RCW 43.21C.031, WAC 197-11-330, -340, -600(3)(b)(i), because the County relied upon a prior May 2009 SEPA Determination of Nonsignificance (DNS) for a prior proposal but failed to issue a new DNS to analyze probable significant adverse environmental impacts of the current adopted ordinance that were significantly different than the impacts of the prior proposal?*

Discussion

Hirst notes that the County prepared a SEPA Determination of Nonsignificance (DNS) in 2009 for a proposal developed by the Planning Commission. It argues that the County erred in not preparing a new threshold determination after the County Council decided to make substantive revisions to the Planning Commission's recommendations.[44]

Hirst argues that the Planning Commission's proposal included designating Type I LAMIRDs only where intensive rural and non-residential development existed on July 1, 1990; establishing 10 acre lot sizes as the minimum in rural areas; establishing spacing criteria between LAMIRDs and between LAMIRDs and UGAs; and consideration of environmental constraints on infill development. In contrast to the Planning Commission recommendations, Hirst argues that the Ordinance substantially increases the amount of development that can

[44] Hirst Brief at 70.

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occur in the County by allowing Type I LAMIRDs to be based on 1990 residential development and eliminating the recommendation that LAMIRDs not be located within one mile of a UGA. In contrast to the Planning Commission's recommendation of 1 home per 10 acres, the County increased this density to as much as 3 homes per acre in Type I LAMIRDs, thus adding the potential for 770 new lots in the Type I Rural Centers.

Hirst argues the Council's changes to the Planning Commission's recommendation increased the intensity of development allowed in rural areas by rezoning individual properties to allow more intense development through the density overlay and intensifying the uses allowed in LAMIRD zoning categories as well as allowing larger building sizes in the LAMIRDs.

The City argues as well that the County erred by not updating the SEPA determination to reflect the analysis of capital facilities associated with a greatly expanded proposal.[45] It argues that the 2011 proposal contained substantial changes not covered by the 2009 DNS, thus requiring a new threshold determination.

Similarly, as Participants in the remand portion of this case, Hirst argues that the County violated SEPA, RCW 43.21C.031 and implementing SEPA policies by failing to conduct a new threshold determination following the 2009 Determination of Nonsignificance (DNS) despite the County's substantial revisions to the Planning Commission proposal.[46]

Participants argue that Ordinance 2011-013 provides for substantial development in rural areas by establishing a new Type I Rural Community LAMIRD and providing for infill and intensified development, increasing density through the density overlays, and expanding LAMIRD boundaries to allow additional development on floodplains and to include wetlands and other critical areas, as well as allowing increases in traffic that require environmental

[45] City Brief at 54-55.
[46] Participants' Objections at 7.

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review.[47] Participants maintain that Ordinance 2011-013 was made available to the public two years after the DNS was prepared and that this ordinance differed substantially from the proposal evaluated in the DNS.

The County counters that the DNS was not based on 2009 draft amendments to either the comprehensive plan or the development regulations. In fact, no specific amendments to policies, development regulations or zoning maps were included in the May 1, 2009 SEPA checklist because no draft of the amendments existed at that time.[48] At the time of the issuance of the DNS in 2009 the Planning Commission was still discussing general policy concepts that would be incorporated into a draft.[49] Instead, the County argues, it acted consistent with WAC 197-11-055(2) by describing the proposal in the checklist at the earliest point, before any specific draft amendments existed. The County states that the responses in the checklist indicated that the County proposed making amendments to its Comprehensive Plan and development regulations that would result in reduced development and impacts as compared to that which would result if existing development patterns were to continue. Thus, the County maintains that description of the proposal in the checklist in 2009 was as accurate then as it was in describing Ordinance 2011-013. The comparison to the Planning Commission recommendation is the wrong inquiry, the County asserts; the issue is whether the adopted ordinance would result in probable significant adverse environmental impacts, as compared to existing regulations.

As a starting point, the Board must determine whether or not the 2009 DNS was prepared for the proposal developed by the Planning Commission. While the County points to the fact that the DNS was issued on May 1, 2009, prior to the formulation of the Planning Commission proposal, it is apparent from the record and the chronology of events that the DNS followed the development of a proposal by the Planning Commission. In this case, the

[47] Participants' Objections at 7-8.
[48] County Response to Objections at 12.
[49] Id.

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Board must conclude the DNS was based on policy guidance from the Planning Commission discussion and the County used this information to formulate the comprehensive plan and development regulations. (See emphasis below.) From the record, the Board concludes that the staff and Planning Commission crafted "directions to guide staff's draft amendment" as is noted in the March 26, 2006 Whatcom County Planning and Development Services memo to the County Planning Commission on the topic of "Rural Element Update".[50]

The stated purpose of the memo was:

> The purpose of this memorandum is to structure the discussion of major policy issues on the proposed rural element update. Staff seeks public comment and Planning Commission direction on these issues during its April 16 2009 public hearing. Further time for Planning Commission deliberation is scheduled for the April 30, 2009 meeting. *This direction will guide staff's draft amendments to the Comprehensive Plan and development regulations*, which will be the subject of a series of public meetings in late May and Planning Commission public hearings in June and July. (emphasis added)

The memo laid out ten policy choices that needed to be made and provided options. For example:

> **How should the County evaluate potential LAMIRDs adjacent to UGAs?**
> [There followed some discussion of the issue]
> Options include:
> Option A. Do not designate LAMIRDs adjacent to UGAs; designate areas as Rural or consider for inclusion within Urban Growth Area
> Option B. Consider LAMIRD designations adjacent to UGAs with justification

Subsequently, on April 16, 2009, the Planning Commission held a public hearing on the options presented in the memorandum. As noted in the minutes, the purpose of that hearing was:

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[50] Ex. R-062.

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> To consider changes to the Rural Element of the Whatcom County Comprehensive Plan and to Whatcom County's development regulations pertaining to land uses and densities in rural areas of the County.[51]

County Planning Staff stated that:

> Davis: The main focus of tonight is to discuss policy issues and the options. At the next meeting we hope you will select options upon which draft amendments will be based.[52]

On April 23, 2009 the Planning Commission issued its "direction", which responded to the ten policy issues presented in the March 26, 2006, Whatcom County Planning and Development Services memo and chose among the options presented in that memo.[53] One week later the County issued the DNS.[54] While the DNS does not specifically reference the Planning Commission "direction", it is not reasonable to assume that the DNS, issued by the Planning Department after seeking and receiving direction from the Planning Commission, was completely divorced from that process. The only reasonable conclusion is that the DNS was based on the "proposal" as shaped by the Planning Commission.

However, our enquiry does not end here. While Petitioners urge that, because there were substantial changes from the Planning Commission's recommendation on which the DNS was based and the Ordinance, as adopted by the County Council, this alone does not mandate the issuance of a new SEPA threshold decision. WAC 197-11-600(3)(b)(i) requires the preparation of a new threshold determination when:

> (i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or
> (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if

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[51] Ex. M-047
[52] Id. at 3.
[53] Ex. R-058
[54] Ex. D-025.

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probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

Petitioners rely on the first of these two provisions, arguing that the Council made substantial changes to the proposal upon which the 2009 DNS was issued. However, those "substantial changes" must be ones that so alter the proposal "that the proposal is likely to have significant adverse environmental impacts". Petitioners have not offered any evidence of such significant adverse environmental impacts. Instead, they focus on the differences between the Planning Commission direction and the final adopted Ordinance and ask the Board to presume that these differences result in probable significant adverse environmental impacts. Petitioners list impacts they believe the new ordinance will have but fail to offer any *evidence* at all of the likelihood or significance of those impacts. Such argument is not evidence and Petitioners have failed to demonstrate that changes to the proposal are "likely to have significant adverse environmental impacts".

Conclusion: Petitioners have failed to carry their burden of proof to demonstrate that the County erred in not reissuing the SEPA threshold determination.[55]

C. Comprehensive Plan Issues

Measures Relating to Rural Development

Hirst Issue 1: *Did the County's adoption of the Ordinance, Sections 1, 2, and 3, providing for rural residential densities of one unit per acre and one unit per two acres, including provisions for rural density overlays, fail to comply with RCW 36.070.020 (Goals (1), (2) and (8)), 36.70A.030(15), (16), and (19), 36.70A.070(5), RCW 36.70A.110(1),RCW 36.70A.130 and RCW 36.70A.070 (preamble) because these densities fail to protect and preserve rural lands and rural character and allow urban growth in the rural area?*[56]

Hirst Issue 3: *Did the County's adoption of the Ordinance, Sections 1, 2, and 3, fail to comply with case law and RCW 36.70A.110(1), providing that urban growth shall not occur*

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[55] Board member Nina Carter dissents as to this ruling.

[56] By letter of December 5, 2011, counsel for Petitioners Hirst et al. indicated that "wherever our brief refers to one-and two-acre zoning, the reference should only be to two-acre zoning."

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outside urban areas; RCW.70A.070(5), RCW 36.70A.030(15), (16) and (19), RCW 36.70A.020 (Goals (1), and (2)); RCW 36.70.130(a), requiring development regulations to be consistent with and implement the Comprehensive Plan, and RCW 36.70A.070 (preamble) requiring internal consistency, because the enactments allow the application of commercial, manufacturing, industrial and tourism zoning categories that are not limited as required to protect rural character or the character of the existing area, yet can be applied anywhere in the Rural area, both inside and outside of LAMIRDs?

Hirst Issue 5: *Did the County's adoption of the Ordinance, Sections 1, 2 and 3, fail to comply with RCW 36.70A.060 and RCW 36.70A.070(5), requiring protection against conflicts with the use of designated resource lands, RCW 36.70A.020 (Goals (2), (8) and (10)), RCW 36.70A.130(1), requiring that development regulations be consistent with and implement the Comprehensive Plan, and RCW 36.70A.070 (preamble), requiring internal consistency, because resource lands are not protected from conflicts with residential development and intensive commercial and industrial uses?*

Hirst Issue 6: *Did the County's adoption of the Ordinance, Sections 1, 2 and 3, fail to comply with RCW 36.70A.070(1), relating to drainage, flooding, and storm water run-off, RCW 36.70A.070(5), requiring the protection of critical areas and surface and groundwater resources, RCW 36.70A.060(3), requiring consistency review of critical area designations and development regulations, RCW 36.70A.480(1), RCW 36.70A.020 (Goals (8), (9), (10) and (14)), RCW 36.70A.130(1), requiring that development regulations be consistent with and implement the Comprehensive Plan, and RCW 36.70A.070 (preamble), requiring internal consistency, because the enactments fail to protect critical areas, wildlife habitat, surface and groundwater quality and shorelines from increased development in Rural areas?*

Futurewise Issue 1: *Does the comprehensive plan as amended by Ordinance No. 2011-013 Sections 1 and 3, Exhibit A: Comprehensive Plan Amendments, and Exhibit C: Official Zoning Map and Comprehensive Plan Map Amendments violate RCW 36.70A.020(1), (2), (8), (9), and (10); RCW 36.70A.030(15); RCW 36.70A.060; RCW 36.70A.070; RCW 36.70A.070(1); RCW 36.70A.070(5); RCW 36.70A.110; RCW 36.70A.130(1) and (4); RCW 36.70A.360; and RCW 36.70A.362? These violations include the following:*

a. *Do the policies, narrative, and descriptors fail to include measures that apply to rural development and protect the rural character of the area as established by the county as required by RCW 36.70A.070(5)(c) including the failure to revise the description of Rural Character and Lifestyle narrative and Policies 2DD-2 and 2GG-8?*

Discussion

"Aspirational language"

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Petitioners argue that, despite GMA's requirement to "protect the rural character of the area"[57] by containing or otherwise controlling rural development, the County's Comprehensive Plan fails to do so because its terms are "aspirational", stating only what "should" be done, and therefore the Plan fails to ensure that future rezones in rural areas will be "contained and controlled".

In response, the County argues that a Comprehensive Plan is defined by the GMA as a "generalized coordinated land use policy statement of the governing body" [58] though the term "policy" is not defined in the GMA. It points out that when a statute does not define a material term, the word should be given its ordinary meaning[59] and that Black's Law Dictionary 1041 (5th ed. 1981) defines "policy" as "the general principles by which a government is guided in its management of public affairs, or the legislature in its measures." In defense of terms in the Comprehensive Plan such as "should" it argues that Plans serve as guides or blueprints to be used in making land use decisions[60]. It argues the Comprehensive Plan must be read as a whole, with each provision read in relation to the other provisions.

The Board notes that both Petitioner Futurewise and Petitioners Hirst rely heavily on the Supreme Court's recent *Kittitas County* decision[61] in support of their contention that the word "should" in isolated policies essentially amounts to *per se* non-compliance. The Supreme Court of Washington in *Kittitas* acknowledged "[t]he GMA requires deference to local government determinations regarding what measures will best protect rural character but it is clear that plans must actually include such measures."[62] In that case the Court

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[57] RCW 36.70A.070(5(c)
[58] RCW 36.70A.030 (4)
[59] *State ex rel. Graham v. Northshore Sch. Dist. 417*, 99 Wn.2d 232, 244, 662 P.2d 38 (1983).
[60] *Citizens for Mount Vernon v. City of Mount Vernon*, 133 WN.2d 861, 873, 947 P.2d 1208 (1997).
[61] *Kittitas County v. Eastern Washington Growth Management Hearings Bd,* 172 Wn.2d 144, 256 P.3d 1193 (2011).
[62] 172 Wn.2d at 164

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looked at the language of Kittitas County's plan to protect rural areas and concluded it "almost exclusively consists of aspirational principles, not imperatives."[63]

However, the *Kittitas County* case does not result in a mandate that every isolated Comprehensive Plan policy must be devoid of conditional language and contain only directional provisions but, instead, the Comprehensive Plan must be considered in its entirety to determine if there is compliance with the GMA.

This Board previously found the use of the word "should" is proper in a Comprehensive Plan, as it is a blueprint or a guide - it is not a regulation.[64] Reconciling the *Kittitas* case with the definition of the word "policy" and the previously well accepted principle that the word "should" is appropriate in planning documents, the Board concludes that the word "should" is appropriate *so long as* the Comprehensive Plan provides a framework that ensures compliance with the GMA and provides measures by which a jurisdiction will be held accountable. As discussed below in the context of Whatcom's challenged Plan, the word "should" may not be appropriate if its use misstates or alters a statutory mandate.

"Protective measures"

RCW 36.70A.070(5) sets forth the requirements for the Rural Element of a county's comprehensive plan. RCW 36.70A.070(5)(c) provides:

> Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:
> (i) Containing and otherwise controlling rural development;
> (ii) Assuring visual compatibility of rural development with the surrounding area;
> (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
> (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and

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[63] *Id.*
[64] *Dry Creek Coalition v. Clallam County*, WWGMHB No. 08-2-0033 (FDO, 6/12/09, pp. 14-15)

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(v) Protecting against conflicts with the use of agricultural, forest and mineral resource lands designated under RCW 36.70A.170.

The Growth Management Act thus expressly requires that the Rural Element of a county comprehensive plan contain measures applying to rural development which protect the county-established rural character.

The Supreme Court explained the significance of this requirement when it upheld the Eastern Board's finding of non-compliance in *Kittitas County.*[65] In that case, Kittitas County had argued that its development regulations, including limitations on the amount of rural land to be zoned at the highest densities,[66] and its rezone criteria, satisfied the GMA "measures." The Court disagreed, saying: "the presence of protective measures in the zoning regulations is irrelevant because the statutory language of the GMA is clear that protective measures *shall* be included in the Plan."[67] The Court commented:

> Additionally, the Petitioners' reference to the County's rezoning criteria as a protective measure, in place of specific protections in the Plan, is somewhat disingenuous. While there are other criteria with varying levels of specificity, the first criterion for a rezone is compatibility with the Plan. KCC 17.98.020(7)(a). Without protections for rural areas in the Plan, this is a meaningless criterion.[68]

According to the Court, reading the GMA to not require that the Plan itself contain the protective measures for rural areas risks the evasion of GMA requirements through site-specific rezones, which typically cannot be challenged for GMA compliance but only for consistency with the existing Plan. "A comprehensive plan that is silent on … protective measures for rural areas … effectively allows rezones that circumvent the GMA."[69]

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[65] 172 Wash.2d 144
[66] The Board notes the "highest density" designations in rural Kittitas were three-and-five-acre densities and under the criteria, could have been applied to 66% of the rural area. 172Wn. 2d at 164, fn 5.
[67] 172 Wn.2d at 164, emphasis in original.
[68] *Id*. fn. 5
[69] 172 Wn.2d at 169

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In the case before us, the Board acknowledges Whatcom County's Ordinance 2011-13 was enacted prior to this clarifying ruling by the Supreme Court. Nevertheless, the Board must apply the clear language of RCW 36.70A.070(5)(c) and its requirement that the Rural Element shall include protective measures, as addressed below.

Futurewise argues that the County's revised rural element fails to ensure protection of rural areas as required by RCW 36.70A.070(5)(c). For example, it notes that Policy 2GG-8 that provides "[d]evelopment within Rural designations should be consistent with rural character as described in this chapter" uses "should" instead of more directive language. In addition, Futurewise maintains this policy itself does not include "measures that apply to rural development and protect the rural character of the area" as required by RCW 36.70A.070(5)(c). Futurewise similarly argues that Policy 2DD-2 directs the County to "protect the character of the rural area" but does not contain any "measures that apply to rural development and protect the rural character of the area" as required by RCW 36.70A.070(5)(c). Futurewise contends that all five categories of required measures – (i) containing development, (ii) visual compatibility, (iii) preventing sprawl, (iv) critical areas protection, and (v) protection for natural resource uses – are lacking.

The County responds that the GMA does not include a definition of what was envisioned as "measures" to guide the County in addressing each of the five listed subsections of the RCW. The County points out that RCW 36.70A.070(5)(c) allows the County to define rural character and establish the measures that apply to rural development and that protect rural character. The County urges that its Comprehensive Plan should be read as a whole, not the rural element in isolation, to identify the required measures.

The Board will now review each statutory sub-category to determine if the County's Comprehensive Plan Rural Element contains "measures" as required in RCW 36.70A.070(5)(c).

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(i) Containing or otherwise controlling rural development

Futurewise argues that the LAMIRD policies, such as Policy 2GG-2 are inadequate to contain development because phrases such as "more intensive development should be contained . . ." fail to contain or control rural development. Hirst notes that the Comprehensive Plan's definition of rural character includes "dispersed commercial and industrial activities" and "smaller lot residential, light industrial, [and] business uses, yet the plan does not have provisions to "contain or otherwise control" these dispersed activities."[70] Additionally, basing rural character on "the general vicinity" creates problems, Hirst maintains, because the term is undefined, is not "otherwise controlled or contained" and provides no basis to "assure visual compatibility of rural development with the surrounding area" as required by both RCW 36.70A.070(5)(c)(i) and (ii). Hirst takes special exception to Comprehensive Plan Policy 2GG-2 which provides that '[m]ore intensive development should be contained" within LAMIRDs "unless justified by the existing rural character of the area" which Hirst maintains will not ensure the containment of development; Hirst states the County has not specified how it will determine "unless justified".

The Board notes again the Supreme Court's *Kittitas* discussion of the risk of subverting GMA requirements if rezone applications are required to be consistent with the Comprehensive Plan, but the Plan itself lacks mandatory provisions to contain rural development.[71] Ordinance 2011-013 adopts development regulations requiring consistency with the Comprehensive Plan for the various zoning districts;[72] but the Plan itself must

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[70] Hirst Brief at 21.
[71] 172 Wn.2d at 164, 169
[72] WCC 20.59.010 - Rural General Commercial District
WCC 20.60.010, .651 - Neighborhood Commercial Center District
WCC 20.61.701 - Small Town Commercial District
WCC 20.63.010, .651 – Tourist Commercial District
WCC 20.64.010, .651 - Resort Commercial District
WCC 20.67.010 – General Manufacturing District
WCC 20.69.010, .651 – Rural Industrial-Manufacturing District
WCC 20.72.010 – Point Roberts Special District

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clearly spell out the measures to "contain and control" development in these rural designations to meet the RCW 36.70A.070(5)(c) standard.

The County states its measures to protect "Rural Character and Lifestyle" are in the Land Use chapter of the Comprehensive Plan.[73] This section contains references to historic rural communities, pastures, home occupations, disbursed commercial activities. It states rural character is "differentiated from the urban areas by ***less*** intensive uses…and ***greater*** predominance of vegetation, wildlife…". It recognizes rural areas as having "a ***unique*** character in terms of established development patterns". And, it further states that "The ***majority*** of the rural area is characterized by the types of visual environment and land uses traditionally considered rural, while a portion of it has been developed with ***more intensive*** uses…" County Policy 2GG-8 states development within rural designations should be consistent with rural character as described in that chapter.

The Board does not find this argument compelling because several adjectives describing "rural character and lifestyle" not are specific enough to determine what is allowed as rural or urban. For example, see the words emphasized above. What is "less" intensive between rural and urban? What is "greater" predominance? Does that mean 10% vegetative cover or 20% wildlife populations? What is a "unique" character of a development pattern? How would a property owner wishing to develop or preserve their land -- or County permit staff -- know how to apply these standards? Lacking specific measures to define how the policies will be implemented (as *Kittitas* requires), the County leaves each application for land development open for interpretation.

Several of these district regulations have provisions saying the design of the proposed use in the zoning district "shall be consistent with the Comprehensive Plan rural land use chapter," highlighting the necessity for measures in the Rural Element adopting clear design criteria.

[73] County Exhibit A, Comprehensive Plan, track changes version at 6

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The Board concurs with Futurewise that language such as Policy 2GG-2 – "more intensive development should be contained" – does not provide a measure to contain and control rural development as required by RCW 36.70A.070(5)(c)(i). Policy 2GG-2 states: "…More intensive development should be contained within [LAMIRDs] unless justified by the existing rural character of the area." Over time, the exception for "existing rural character" may swallow the rule. There are no measures in the Rural Element to contain higher-density residential zoning – R2A or RRDO – or the various commercial-industrial designations allowed in the rural area.

The Board notes Ordinance 2011-013 adopted development regulations for the Rural Residential Density Overlay, which allows limited infill in areas already developed at intensities greater than 1 du/acre, that are measured in relation to lots existing on or before the effective date of the ordinance.[74] The regulations also require the overlay to be mapped.[75] The Board did not find in the record a map showing where the overlay will be applied; it only found a planning staff memorandum describing lots in the Lake Whatcom Watershed that may be developed as a result of the overlay.[76] Thus, a "measure" in the Rural Element to contain rural development might specify the RRDO is restricted to areas mapped and measured in relation to lots existing on the date of the Ordinance. This would ensure any future extension of the RRDO would entail a Comprehensive Plan revision process. Similarly, a measure to contain R2A development might specify the designation is restricted to areas mapped in Ordinance 2011-013.[77]

As to the various commercial-industrial districts, the Board finds clear "contain and control" measures for some of these districts in the County's Land Use section. For example,

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[74] WCC 20.32.252.1.b and 2.b; WCC 20.36.252.
[75] WCC 20.32.252; WCC 20.36.252
[76] Ex. R-007, Planning Staff Memorandum to County Council, April 5, 2011
[77] This limitation was approved by the Board in its Order Following Remand from the Supreme Court (Rural Densities), Case No. 05-2-0013 (Aug. 31, 2011)

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Policies 2A-8 and 2A-9 specify location of certain commercial, tourist/resort, and industrial uses "within urban growth areas or limited areas of more intensive rural development."[78] These policies could be readily imported or cross-referenced in the Rural Element.

However, Policies 2A-8 and 2A-9 do not include the Neighborhood Commercial Center (NC)[79], General Manufacturing (GM)[80], or Rural Industrial Manufacturing (RIM)[81] districts. The NC, GM and RIM districts, as described in the development regulations, are not limited as to location or size in the rural area; thus, measures to "control and contain" this kind of development are lacking. The County must adopt measures to comply with the statute.

Conclusion: The Board determines Petitioners have met their burden of proving the County's failure to provide the necessary measures to contain or otherwise control rural development as required by RCW 36.70a.070(5)(c)(1).

(ii) *Assuring visual compatibility of rural development with the surrounding rural area*

Petitioners Futurewise[82] and Hirst[83] assert the County has failed to include in its Rural Element the measures needed to assure visual compatibility of new rural development with surrounding areas.

Petitioner Futurewise argues that the Rural Element does not include "measures that apply to rural development" "[a]ssuring visual compatibility of rural development with the surrounding rural area" as required by RCW 36.70A.070(5)(c)(ii)."[84] Hirst claims there is

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[78] Policy 2A-8 - Include business/industry parks, tourist/resort areas and allowance for existing crossroads commercial areas within urban growth areas or limited areas of more intensive rural development.
Policy 2A-9 – Retain existing rural and heavy industrial areas in the northwestern region of the county within urban growth areas or limited areas of more intensive rural development.
[79] WCC Chapter 20.60
[80] WCC Chapter 20.67
[81] WCC Chapter 20.69
[82] Futurewise Legal Issue 1a
[83] Hirst Legal Issue 2
[84] Futurewise Brief at 6.

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only one reference in the CP that touches on this requirement apparently in reference to Policy 2DD-2.

In turning to the measures to assure visual compatibility, the County points to language in its Comprehensive Plan Land Use text – Rural Lands section[85] - and in its Design Chapter describing rural character. In this chapter the County has identified its rural character.[86]

> 'Rural,' a middle ground between urban/suburban settings and true wilderness, consists of large spaces, low-intensity uses, and environmentally fragile areas. Rural evokes images of fields and crops, farm buildings, rolling hills, great sweeping valleys, wooded ridges, wide inspiring views, peace and quiet, and a sense of small town community. Often associated with these images is the fragrance of fresh cut hay, spread fertilizers, and plowed earth. These are all characteristics not normally associated with more urbanized communities. The rural environment can provide both pleasure and rewards to its residents and visitors alike. Land use and development decisions can either degrade or enhance this rural environment and the lifestyle it affords.

The County cites three goals adopted in the Design Chapter to implement actions in the rural area:

> Goal 10C: Retain and enhance the components that make up Whatcom County's rural integrity – the basis of its identity – its "sense of place."
> Goal 10D: Retain the natural landscape diversity and open space experience.
> Goal 10F: Save, protect, and enhance our county's rural setting from conversion to urban/suburban development.

Ordinance No. 2011-013 adopted an additional Design Chapter goal for Type I LAMIRDs, stating:

> Goal 10B: As Rural Communities evolve, utilize design tools and decisions which are sensitive to and compatible with the positive character of the surrounding natural setting.

The County states: "These specific goals are directives for the creation of development regulations and the making of land use decisions in the rural areas."[87]

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[85] Ex. D-003 (Ordinance, p. 5-6)
[86] Comprehensive Plan, Appendix 13

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However, in reviewing the Rural Element amendments enacted with Ordinance 2011-013, the Board is struck by the absence of measures to ensure continued predominance of the natural landscape over the built environment or visual compatibility with those "images of fields and crops, farm buildings, rolling hills … and sense of small town community" that define Whatcom's rural integrity. Given the clear description of rural character already adopted by the County, meeting the statutory requirement to include in its Rural Element the measures needed to assure visual compatibility and protect that character should be relatively straightforward.[88]

Conclusion: The Board determines Petitioners have met their burden of proving the County's failure to provide the necessary measures to assure visual compatibility of rural development with the surrounding rural area as required by RCW 36.70A.070(5)(c)(ii).

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area

Discussion

RCW 36.70A.070(5)(c)(iii) requires the rural element to include measures for reducing the inappropriate conversion of undeveloped land into sprawling low-density development in the rural areas. The County claims Policy 2DD-8 addresses this requirement. Policy 2DD-8 states:

> Allow more intensive uses in limited areas of more intensive rural development designated consistent with RCW 36.70A.070(5)(d), which provide public and commercial services and employment opportunities, while preventing them from spreading in patterns of sprawl development and having an adverse impact on surrounding rural areas and nearby resource lands, and protecting rural character.

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[87] County Brief, at 37

[88] For example, one of the measures might incorporate or cross-reference the Design Chapter policies in Policy 2DD-2.

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Thus the County states its LAMIRD measures under this policy include

- preventing patterns of sprawl development,
- preventing adverse impact on surrounding rural areas,
- preventing adverse impact on nearby resource lands and
- protecting rural character.

The County argues these standards all provide specific direction from which development regulations can be drafted or reviewed and through which land use decisions can be made. Petitioner Futurewise recognizes that Policy 2DD-8 and Policies 2DD-3 and 2DD-10 all address this "conversion" requirement. However, Futurewise argues that Policy 2DD-8 does not include "measures" and that the voluntary incentives of Policy 2DD-3 and 2DD-10 will not accomplish the RCW 36.70A.070(5)(c)(iii) requirement. The County responds that these statements are insufficient to result in a finding of non-compliance given the deference to which a county's action is entitled. The County argues that Futurewise's position is further eroded by consideration of the following CP policies:

> Policy 2DD-1 Concentrate the majority of growth in urban areas and recognize rural lands as an important transition area between urban areas and resource areas.
>
> Policy 2DD-6 … on parcels 20 acres and greater require non-agriculturally related development to be clustered …

The Board notes Policy 2DD-1 - "Concentrate the ***majority*** of growth in urban areas" - has not in fact constrained the County from adopting land use designations that provide capacity for **all** its projected population growth to occur in rural lands.[89] Further, Policy 2DD-8 only addresses the LAMIRD designations, and the Board has already identified aspects of the County's rural land use designations other than LAMIRDs that lack the "contain and control" provisions necessary to "reduce the inappropriate conversion of undeveloped land into sprawling low-density development." The Board assumes that when the County adopts appropriate measures in the compliance phase of this appeal those measures adopted to

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[89] See discussion below at Section F – Population Allocation to LAMIRDs and Rural Areas

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satisfy RCW 36.70A.070(5)(c)(i) and (ii) will at the same time serve to reduce sprawl development as required by (c)(iii).

Conclusion: The Board determines Petitioners have met their burden of proving the County's failure to provide the necessary measures to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area, as set forth in RCW 36.70A.070(5)(c)(iii).

(iv) *Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources*

Petitioner Futurewise, Hirst and Bellingham argue that the County failed to adopt the required measures to protect critical areas and water resources. The Board notes, at the outset, that the County's comprehensive plan contains an Environment chapter and the County has adopted critical areas regulations (WCC Chapter 16.16) as required by RCW 36.70A.040 and .172. Those policies and regulations are not challenged in the present case and may not be collaterally attacked. The question here is whether the County's newly-amended Rural Element complies with RCW 36.70A.070(5)(c)(iv) in containing "measures that apply to rural development" and protect rural character by "protecting critical areas … and surface water and ground water resources."

Petitioners raise two challenges: R2A designation in the Chuckanut Wildlife Corridor and RR5/RRDO designation in the Lake Whatcom watershed.[90]

Hirst asserts protective measures are required to preserve wildlife habitat in the Chuckanut Wildlife Corridor.[91] As designated in the County's Critical Areas Ordinance:

> The Chuckanut Corridor … is necessary to officially recognize the last remaining wildlife corridor area in the Puget Trough where natural land cover extends from

[90] Protection of Lake Whatcom water quality is addressed further in Section L below.
[91] Hirst Prehearing Brief at 64-65

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> marine waters to the National Forest Boundary east of Chuckanut Mountain which has been identified as such through eco-regional assessment prepared by the Washington State Department of Fish and Wildlife.

Hirst points out the Ordinance provides R2A zoning for an area of approximately 118 acres in the Chuckanut Corridor, from Lake Samish to the Skagit County line. Hirst states the conservation plan for the Cascades-to-Chuckanut (C2C) Corridor indicates "human actions that reduce, fragment, or degrade natural habitats are ultimately the leading causes of species endangerment."[92] Hirst argues the County ignored evidence that residential and infrastructure development are a significant cause of fragmentation and habitat degradation and that the higher rural density in this area would reduce wildlife habitat.

With regard to wildlife habitat, Futurewise cites a 2009 Washington State Department of Fish and Wildlife report showing that maintaining the state's native wildlife species requires densities no greater than one dwelling unit per 20 acres, augmented by wildlife conservation planning measures.[93] The report estimates at densities of one dwelling unit per 2.5 acres over 70% of the native species will be lost. Even with conservation planning implemented, just over half of the state's wildlife species will survive at densities of 1du/2.5 acre, according to WDFW.

Hirst argues that the County ignored the natural environment including wildlife habitat, water quality, and shorelines and the record does not reflect any attempt by the County to protect rural character by protecting critical areas and groundwater resources as required by RCW 36.70A.070(5)(c)(iii).[94] Instead, Hirst maintains, the Ordinance increases development in shorelines of statewide significance, including one and 2 acre lots on the shore of Lake

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[92] Id. citing Conservation Biology Institute, Cascades-to-Chuckanut Conservation Plan (Jan. 2004), at 8; Conservation Analysis of the C2C: Ecological Changes – Effects of Human Development, at 13-15.
[93] Ex. 72B-28. WDFW, *Landscape Planning for Washington's Wildlife: Managing for Wildlife in Developing Areas* (Olympia, WA, Dec. 2009) at 1-1.
[94] Hirst Brief at 61. Hirst cites RCW 36.70A.070(5)(c)(iii). The Board will presume this is a typographical error as from the context it is clear that Hirst was referring to RCW 36.70A.070(5)(c)(iv).

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Whatcom. Hirst also argues that the pattern of land use development established by the ordinance allows up to 90% impervious surfaces in the LAMIRD's and establishes patterns of development incompatible with the use of the land by wildlife or fish. This is contrary to policy 2DD – 4, which requires the protection of essential habitat.

Futurewise submitted aerial photographs of several 1- to 2-acre rural lots in Whatcom County to demonstrate that on smaller rural lots the percentage of impervious surface for buildings and driveways exceeds the 10% that is the standard limit for protection of wetlands and fish habitats.[95] Futurewise argues that measures in the Rural Element to protect critical areas and water quality must include numerical limitations on impervious surfaces and numerical requirements for retention of forested/vegetative cover.

Bellingham and Hirst contend Ordinance 2011-013 fails to comply with RCW 36.70A.070(5)(c)(iv) because the Ordinance does not contain measures that apply to rural development in the Lake Whatcom watershed and protect surface and groundwater resources. The City points out that the County Executive committed to the State Department of Ecology that the County would enact stringent new controls on watershed development aimed at zero-discharge of phosphorus-laden runoff.[96] Those controls have not been enacted. The development in the watershed made possible by Ordinance 2011-013 and by the County's lifting of its moratorium is not subject to any of the indicated controls.

The County asserts its Plan contains the necessary measures in Policy 2DD-2 and 2DD-4:

> Policy 2DD-2: Protect the character of the rural area in terms of natural landscape as well as rural lifestyles and economy, per the GMA definition of rural character (RCW 36.70A.030(15)). Protect and value clean water and air, the

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[95] FW Brief at 42-43. Ex. C-615A, Aerial photos from Emerald Lake and Guide-Meridian Wiser Lake areas.
[96] Ex. C-049B, Letter from County Executive Pete Kremen to Ecology (March 10, 2011) promising "accelerated program" to achieve "phosphorus protections for Lake Whatcom in County development regulations" including "recommendations for code improvements supported by Ecology"; Ex. C-049A, Letter from Ecology announcing decision on Bellingham's petition to close the watershed to withdrawals (March 11, 2011).

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natural environment, forested lands, agriculture, parks, trails, and open space that provide for a high-quality rural lifestyle.
Policy 2DD-4: Conserve open space, park land, and trails for recreational use, as well as to protect essential habitat such as riparian areas and wetlands.

The County characterizes evidence presented by the Petitioners as "perceived problems with small lot sizes, from surface water runoff to contaminated wells to failing septics," and states these issues are speculative and ignore the County's development regulations.[97] The County asserts it need not respond to academic studies which may not be germane to local circumstances.

The Board in this case finds it need not consider the non-local studies[98] but cannot ignore the current WDFW report, Ecology bulletins, WRIA 1 Assessment, Cascades-to-Chuckanut Conservation Plan, and other authoritative reports in the record. The Board finds that Petitioners provided ample evidence about risks to water supply, water quality, and water resources for fish from rural development in Whatcom County. For example:

- Testimony from Ecology's Steve Hood that RR5 zoning allowance of 20% impervious surface and RRDO allowance of smaller lot sizes "cannot be effectively mitigated under current regulations."[99]
- Lummi Nation program noting salt water intrusion that has required closure of wells on the Lummi Peninsula where allowed densities were formerly 1du/acre.[100]
- Evidence of surface and ground water contamination from septic systems.[101]
- Closure to surface and groundwater appropriation in the Nooksack River Basin, affecting North Bellingham and Fort Bellingham/Marietta areas proposed for LAMIRD and RRDO designation.[102]

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[97] County Response Brief, at 73-74.
[98] The *Kittitas* Court noted: "[Petitioners] presented sparse local data to the Board and instead focused mostly on studies of land use in other counties and states, academic articles, and density decisions in other jurisdictions. … [The County] responded with little relevant local information. … As a result, it is unclear how three-acre rural density designations are appropriate in the County's rural area, where *there is substantial evidence that they are harmful in other communities*." 172 Wn.2d at 160-161 (emphasis added).
[99] Ex. C-001
[100] Ex. 72B-28, *Lummi Nation Nonpoint-Source Management Program* (2002) at 7.
[101] Ex. 72B-28, *Whatcom County Comprehensive Water Resources Plan* (1999), at 115-16 and John Stark, *Septic system inspections turn up problems in Whatcom County*, Bellingham Herald (Nov. 8, 2010).

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The County's unsupported assertion that its regulations are adequate to provide the needed protection rings hollow. The County provides no information about the DRs that allegedly address these issues, but the current report on Lake Whatcom water quality demonstrates that the existing regulations have not protected Lake Whatcom and that the problems are actual and proven, not speculative.[103] And the County's response is silent regarding how its regulations protect the Chuckanut Wildlife Corridor.

In this case, the measures necessary to protect surface and groundwater resources in the Lake Whatcom area are clearly identified in the record. Incorporating them into the Rural Element, as required by RCW 36.70A.070(5)(c)(iv) as construed by the *Kittitas* Court, should be a straightforward task. For example, the Board notes the County Council considered an amendment to the Ordinance making application of the RRDO in the Lake Whatcom area contingent on adoption of "more protective development standards."[104] In addition, Ecology's Steve Hood testified: "The easiest way to meet the phosphorus targets is to have no more than 10% of a site as impervious surface and to disperse it into a forested area that covers 65% of the site." Zero-discharge development standards, 10% impervious surface limits, and perhaps restrictions that limit new wells[105] must be considered. Measures to protect the habitat values of the Chuckanut corridor must address habitat fragmentation and degradation. Incorporating these and other measures into the Rural Element, as required by RCW 36.70A.070(5)(c)(iv) as construed by the *Kittitas* Court, should be a straightforward task.

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[102] Ex. C-053, WRIA I Planning Unit, *WRIA I Watershed Management Plan Phase 1 Section 2 Assessments, Problem Identification, and Findings* (March 25, 2005) at 58.
[103] Ex. C-079, at 18
[104] Index M-002, at 9-10: motion to amend to add "The changes to the Whatcom County official zoning code that would allow any subdivision of land of less than five acres in the Lake Whatcom watershed will not become effective until June 1, 2012 or until the Council adopts more protective development standards as discussed with the Department of Ecology by the County Executive, whichever is first." The motion failed.
[105] See *Kittitas* Court discussion of county responsibility to ensure subdivision regulations protect water resources, 172 Wn.2d at 178-179.

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Conclusion: The Board determines Petitioners have met their burden of proving the County's failure to provide the necessary measures to protect the Chuckanut Wildlife Corridor and Lake Whatcom's water resources as required by RCW 36.70A.070(5)(c)(iv).

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170

Petitioners Futurewise[106] and Hirst[107] assert the County has failed to include in its Rural Element the measures needed to ensure against conflicts with the use of agricultural lands.[108] While the County argues the requirement for "measures" applies only to ALLTCS (lands designated under RCW 36.70A.170), not to APO lands, these ALLTCS designations are not mapped. Thus, the Board deems that all lands in "agricultural" status should be presumed designated until there is a contrary determination.

Hirst argues that the County's enactment affects agricultural land in 3 ways: it provides new zoning categories, RGC and RIM, that provide for only 25 feet setback from agricultural uses with no required landscaping; it does not include standards to protect agricultural lands from conflicting uses; and the enacted changes will result in additional residential zoning on small lots adjacent to agricultural land.[109] Hirst argues that this is contrary to other county zoning provisions which require agricultural uses to be separated by 150 to 300 feet from

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[106] Futurewise Legal Issue 1b
[107] Hirst Legal Issue 5

[108] The Board notes the Emerald Lake LAMIRD (and presumably others as well) is adjacent to designated forest land. Petitioners have failed to put forward any factual record of conflicts with forest uses, and the Board will not address the issue. While the RCW 36.70A.070(5)(c)(v) requirement for measures to protect against conflicts with the use of designated forest lands is mandatory, it is still the Petitioner's burden to demonstrate, through facts in the record, legal authority and argument, that the County's plan does not comply.

[109] Hirst Brief at 51-52

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residential uses, and thus contrary to the principle that natural resource land functions have a priority over other functions on rural lands.

Further, Hirst argues that the County's enactments are contrary to comprehensive plan policies which require the County to protect and value agriculture (eg. CP Policy 2DD-2 and 2GG-5) which establish the County's obligation to protect agriculture and reduce land use conflicts.

The Board addresses the issue of buffers between LAMIRDs and agricultural uses below and determines the Petitioners have failed to meet their burden of proving the County's failure to provide the necessary protection against conflicts. The Board has ruled above that the County on remand must provide clear measures in the Rural Element of its Comprehensive Plan as well as in its development regulations to protect rural character in compliance with RCW 36.70A.070(5)(c)(i-iv). While the Board finds the Petitioners have failed to meet their burden on measures to protect against resource land conflicts, the County on remand may wish to consider additional measures to protect this aspect of the rural character their Plan defines.

Conclusion: The Board determines Petitioners Bellingham and Hirst have failed to meet their burden of proving the County's Rural Element failed to provide the necessary measures to protect against conflicts with the use of agricultural resource lands designated under RCW 36.70A.170.

Conflicts with Agricultural Uses

Futurewise Issue 1b: *Do the policies (including Policies 2DD-5, 2DD-6, and 2GG-5), narrative, and descriptors fail to include measures that apply to rural development and protect against conflicts with the use of agricultural lands designated under RCW 36.70A.170 as required by RCW 36.70A.070(5)(c), RCW 36.70A.070(5)(c)(v), and RCW 36.70A.060 including adequate buffers and protections for lands in the Agriculture Protection Overlay Zone?*

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Discussion

The Policies in question provide:

> Policy 2DD-5: Use an "Agriculture Protection Overlay Zone" designation in certain Rural zoned areas as a way to help achieve the goal of conserving and enhancing Whatcom County's agricultural land base. [110]
>
> Policy 2DD-6: In the "Agriculture Protection Overlay Zone" on parcels 20 acres and larger with Rural 5 acre and Rural 10 acre zoning, require non-agriculturally related development to be clustered where it would not create more conflicts with accepted agricultural practices, on a maximum of 25 percent of the available land with the remainder available for open space and agricultural uses. Development standards shall provide flexibility to achieve development potential in cases of natural limitations.
>
> Policy 2GG-5: Minimize potential conflicts of rural residential development near designated natural resource lands to prevent adverse impacts on resource land uses.

Futurewise argues that the policies for the County's Agricultural Protection Overlay (APO) zone do not comply with GMA's requirement "to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products."[111]

The County argues that Petitioners err in claiming that rural lands subject to the County's APO are necessarily designated Agricultural Lands of Long Term Commercial Significance ("ALLTCS") under RCW 36.70A.170(1)(a). It maintains that the Comprehensive Plan makes clear that only the lands designated as "Agriculture" in the Plan are GMA designated agricultural lands.

The County points out that this Board noted in *Stalheim et al. v. Whatcom County*[112]:

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[110] It does not appear that this Policy was amended by Ordinance 2010-013; see D-003A.
[111] *King County v. Central Puget Sound Growth Management Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 556, 14 P.3d 133, 140 (2000).
[112] WWGMHB No. 10-2-0016c, FDO at 24 (4/8/11) (emphasis added)

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> Petitioners assume that lands within the Agricultural Protection Overlay (APO) are Ag Lands of LTCS and that by removing this overlay, as shown on the amended land use maps, the County thereby "de-designated" such lands. **As Martin admits, WCC 20.38, Agriculture Protection Overlay, "never explicitly states that APO lands subject to its protection are actually GMA resource lands designated under RCW 36.70.170." In fact, the APO designation is much broader than that, and includes "all rural lands designated R-5A or R-10A on the official zoning map" outside a UGA and held in parcels of 20 acres or larger.**

In its briefing, Futurewise seeks to re-open and re-argue the question as to whether APO lands are ALLTCS and ignores the fact that the same regulations that make these parcels subject to the APO also provide for their protection, and these regulations, applicable in both R5A and R10A zones, were specifically upheld as compliant with the GMA's requirements to conserve and protect agricultural land.[113] As the County points out, the Ordinance at issue in this case did not amend the GMA compliant APO development regulations originally adopted in 1997 to protect agriculture.

The challenged ordinance in this case was adopted to amend the County's Rural Element to comply with the Supreme Court *Gold Star* decision.[114] Ordinance 2011-013 is not the initial adoption of the Rural Element or its implementing development regulations. Thus, the Board restricts its review to any deficiencies in the Plan that occurred as a result of the adoption of the Ordinance.

With regard to the issue of buffers between designated ALLTCS and rural uses, the County argues that, historically, rural conflicts have been of little concern to farmers. In addition, it notes that the County has adopted a specific Right to Farm Ordinance in WCC 14.02. The purpose of this regulation is in part:

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[113] *Wells, et al. v. Whatcom County*, 100 Wash.App. 657 (2000).
[114] *Gold Star Resorts, Inc., v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009)

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> The purpose of this chapter is to promote a good neighbor policy between agricultural and nonagricultural property owners by requiring notice to purchasers and users of property adjacent to or near farm operations of the inherent potential problems associated with such purchase or use, including but not limited to the noises, odors, dust, chemicals, smoke, and hours of operations that may accompany farm operations. Through mandatory disclosures purchasers and users will better understand the consequences of living near farm operations and be prepared to accept attendant conditions as the natural result of living in or near rural areas.

While Petitioner cites various sections of the existing setback provisions of WCC 20.80 to claim that agricultural uses are required to buffer residential areas rather than the opposite way around, WCC 20.80.255 set-backs apply only to the specific farm uses mentioned in the code section and not all agricultural activity; the farm uses mentioned are those that involve the keeping of animals or manure.[115] There is no buffer or setback within the development regulations for general agricultural activity such as growing of crops. In addition, pastures are specifically excluded from the setback requirement.[116] Petitioner fails to point out that the development regulations provide a distinction as to what is there first. In fact, it is new residences that cannot be built within 300 feet of these existing farm uses; once there is an existing residence then the 150 foot buffer applies to new farm uses.

The Board notes that there are other protections built into the development regulations as well: Any development or land division under WCC 20.38[117] or 20.32[118] must incorporate buffers of up to 100 feet between houses and tracts used for agriculture; it is only the large rural lots that have no specific prescribed buffer through newly adopted language; the setback requirements of WCC 20.36[119] continue to apply and the actual siting of buildings is limited from locating close to the property line by fire protection requirements.

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[115] WCC 20.80.210
[116] WCC 20.80.255(2).
[117] WCC 20.38.060
[118] WCC 20.32.350
[119] WCC 20.36.350

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Conclusion: The Board concludes that Petitioners have not established that the County Comprehensive Plan Policies, including Policies 2DD-5, 2DD-6, and 2GG-5, narrative, and descriptors fail to include measures that apply to rural development and protect against conflicts with the use of agricultural lands designated under RCW 36.70A.170 in violation of RCW 36.70A.070(5)(c), RCW 36.70A.070(5)(c)(v), or RCW 36.70A.060.

Protection of Lands in the Agricultural Protection Overlay (APO)

Futurewise's argument to support this Issue is based on the faulty premise that lands within the APO are designated as resource lands under RCW 36.70A.170. The Board has rejected this premise in *Martin v. Whatcom County, supra.*

Policy 2DD-5 and 2DD-6 by their very wording apply only to rural lands. The restriction in Policy 2DD-6 that requires a preservation of seventy five percent of the parcel for open and agricultural type uses preserves the rural landscape and character of the rural area and in fact has the absolute opposite effect than argued by Petitioner Futurewise. Twenty five percent of the parcel is not taken from the lands available for agricultural uses, but instead seventy five percent of the land is protected for agriculture or open space uses.

Futurewise's argument as to why the APO provisions of the County Comprehensive Plan and Code are before the Board for consideration is based on the adoption of Policy 2GG-5 in the Ordinance which applies only to designated resource lands and has nothing to do with the APO.

While Futurewise may challenge the wording added to Policy 2DD-6 and raise the issue whether this additional wording relating to preventing conflicts is in compliance with the GMA, the development regulation chapter contained in WCC 20.38 was not altered nor was alteration required by or reviewed by the County and therefore it is not properly before the

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Board for review. Therefore under *Wristen-Money v. Lewis County*[120] and *Thurston County*[121], the Board must restrict its review to any development regulation deficiencies that have occurred as a result of the adoption of this ordinance.

Conclusion: The Board will not consider challenges based on portions of the County's development regulations that were not amended.

Rural Policies and LAMIRDs

Futurewise Issue 1c: *Do the policies, narrative, and descriptors for urban growth areas and limited areas of more intense rural development (LAMIRDs) including Policies 2A-11; 2DD-8; 2HH-1, 2, and 3; and 2JJ-4; and the Rural Community, Rural Tourism, and Rural Business designation descriptors*[122] *violate RCW 36.70A.070(5), (5)(c), and (5)(d); and RCW 36.70A.110?*

Discussion

The Board will consider the challenged Policies in turn.

Policy 2A-11

Policy 2A-11 in its entirety reads:

> Ensure that the development potential of contiguous lands in common ownership is not compromised when urban growth boundaries and/or LAMIRD boundaries (except in cases that could create abnormally irregular boundaries) are designated. The term common ownership should include lands owned by the same persons or entities and also by affiliated companies with common ownership. This should be accomplished without expanding UGA and/or

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[120] *Wristen-Mooney v. Lewis County*, WWWGMHB No. 05-2-0020 (Order to Dismiss, 12/8/05), "[t]he County is correct that unchanged comprehensive plan provisions and development regulations may not be challenged in a petition for review of subsequent enactments."

[121] *Thurston County v. Western Washington Growth Management Hearings Board* 164 Wn.2d 329 (2008):We hold a party may challenge a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven year update. This rule provides a means to ensure a comprehensive plan complies with recent GMA amendments, recognizes the original plan was legally deemed compliant with the GMA, and preserves some degree of finality.

[122] The Rural Community, Rural Tourism, and Rural Business designation descriptors are addressed elsewhere in this Order.

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> LAMIRD boundaries beyond that ownership and without bridging natural divisions of urban/rural land uses such as roads, rivers, and other natural features.

Futurewise argues that Policy 2A-11, which directs the County to ensure that the development potential of contiguous lands in common ownership is not compromised when urban growth boundaries are designated, is inconsistent with the Growth Management Act and with the State Supreme Court's *Thurston County* holding limiting the size of the UGA.[123] For LAMIRD boundaries, Futurewise argues that it is inappropriate to consider the development potential or ownership status of the additional contiguous lands because RCW 36.70A.070(5)(d)(i) requires that the lands in the LAMIRD be within the Logical Outer Boundary of the existing area or use.

In response to Futurewise's arguments regarding Policy 2A-11 the County asserts that the Ordinance did not address Urban Growth Areas nor was new language inserted into Policy 2A-11. However, in reviewing the "track changes" version of the Ordinance, it appears to the Board that, in fact, new language was inserted into this Policy.[124] While the County alleges that this Policy is not properly before the Board, it argues that a reading of the actual language of the Policy, both as it applies to Urban Growth Areas and as it applies to LAMIRDS, confirms the Policy is compliant with the GMA.

The County asserts that this Policy requires the County to "consider other adjacent land in common ownership but it does not mandate the additional land be included in a LAMIRD."[125]

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[123] Futurewise Prehearing Brief at 17-19, citing *Thurston County*, 164 Wn.2d at 344, 352.
[124] See, Exhibit D-003A: Policy 2A-11: Ensure that the development potential of contiguous lands in common ownership is not compromised when urban growth boundaries and/or LAMIRD boundaries (except in cases that create abnormally irregular boundaries) are designated. The term common ownership should include lands owned by the same persons or entities and also by affiliated companies with common ownership. This should be accomplished without expanding UGA and/or LAMIRD boundaries beyond that ownership and without bridging natural divisions of urban/rural land uses such as roads, rivers, and other natural features.
[125] County Brief at 49.

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The County argues that nothing in the GMA prohibits this additional consideration so long as the *resulting decision* is consistent with the GMA.

However, the Board disagrees. RCW 36.70A.070(5)(d) establishes the standards for LAMIRDs. The Supreme Court in *Gold Star* emphasized that the provisions of RCW 36.70A.070(5)(d) are "mandatory criteria."[126] The common ownership of contiguous lands is not a statutorily established basis for inclusion of lands within a LAMIRD. To argue, as the County does, that it may adopt comprehensive plan policies supporting the consideration of factors to be considered in establishing LAMIRDs, so long as the use of such policies does not result in non-compliant LAMIRDs, when applied, ignores the important role of the Plan Policies in guiding planning decisions.

Conclusion: The Board finds that Policy 2A-11's consideration of the development potential of contiguous lands in common ownership as a basis for establishing LAMIRDs is in violation of RCW 36.70A.070(5)(d).

Policy 2DD-8

The County points out that Petitioner Futurewise alleges a violation of 2DD-8, yet no argument to support this allegation is provided and there is no further mention of this policy under the issue statement and therefore, it should be considered abandoned. The Board agrees – unbriefed issues are deemed abandoned.

Conclusion: Petitioner's challenge to Policy 2DD-8 in its Issue 1c is deemed abandoned.

Policy 2GG-2

Futurewise also takes issue with Policy 2GG-2 which allows more intensive development outside of LAMIRDs if justified by the existing rural character of the area. This policy was not

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[126] *Gold Star Resorts*, 167 Wn.2 at 736

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challenged in the Issue statement and the Board will not consider Futurewise's argument in this regard.

Conclusion: Futurewise did not challenge Policy 2GG-2 in its PFR in Issue 1c, and may not raise the challenge for the first time in its briefing.

Policy 2HH-1

> Policy 2HH-1: Rural Community (Type I LAMIRD) designation criteria
> A. Location Criteria. Rural Communities may be designated in an area that:
> 1. Was characterized by existing development more intensive than surrounding rural areas (residential or nonresidential) as of July 1, 1990, and
> 2. Is not currently designated by the Comprehensive Plan as Urban Growth Areas (UGAs) or Resource Lands, and
> B. Additional Location Criteria. The following may serve as additional criteria for Rural Community designation (relative to the specific circumstances of the area, and in combination with each other):
> 1. The existing (1990) residential built environment was more intensively developed than surrounding areas;
> 2. Public services are available to serve potential infill, such as adequate potable water and fire protection, transportation facilities, sewage disposal and stormwater control; or
> 3. The area is planned for more intensive development in a post-GMA local subarea plan.
> 4. Existing zoning prior to designation as a Rural Community, except existing zoning may not be a sole criterion for designation.
> C. Outer Boundary Criteria. For land meeting the criteria described in A and B above, Rural Community boundaries must minimize and contain areas of intensive development
> and be delineated predominately by the built environment, and shall include:
> 1. Parcels that were intensively developed and characterized by the built environment (including water lines or other utility lines with capacity to serve areas of more intensive
> uses) on July 1, 1990.
>
> 2. Parcels that on July 1, 1990 were not intensively developed may be included within Rural Community boundaries if they meet any of the following conditions:
> a. Including the parcel helps preserve the character of an existing (built) natural neighborhood;

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b. Including the parcel allows the logical outer boundary to follow a physical boundary such as bodies of water, streets and highways, and land forms and contours;
c. Including the parcel (or in limited cases, a portion of the parcel) prevents the logical outer boundary from being abnormally irregular;
d. Including the parcel is consistent with efficient provision of public facilities and services in a manner that does not permit low-density sprawl;
e. Including the parcel does not create a new pattern of low-density sprawl.

Futurewise and Participants point out that Policy 2HH-1, the criteria for Type I LAMIRDs, refers to "parcels" in its "outer boundary criteria" in Part C, yet under the statute, Type I LAMIRDs are limited to "existing areas and uses." Therefore, they argue that if a part of a lot is not actually used, it may not be included. They argue that this policy violates RCW 36.70A.070(5)(d)(iv) because it fails to include the proper definition of existing areas.

The County argues that this policy is consistent as written with the GMA and there is no legal authority cited to support Petitioners' contention that using the word "parcels" somehow runs afoul of the GMA. The County points out, if the concern is that the term "parcels" is inconsistent with the requirement to minimize and contain LAMIRDs, the requirement is stated in the provision of this policy that "Rural Community boundaries must minimize and contain areas of intensive development and be delineated predominantly by the built environment" and is further reinforced by Policies 2JJ-1 and 2JJ-2.

While the Board recognizes that County Policy 2JJ-1 and 2JJ-2 require the LAMIRD boundaries to be consistent with RCW 36.70A.070(5)(d), the use of the term "parcel" in Policy 2HH-1 is not consistent with the statute. Although the GMA does not define "area", a common sense understanding of the term would lead to the conclusion that it could include a mere portion of a large parcel. Failure to use the term "area" as used throughout RCW 36.70A.070(5)(d)'s description of LAMIRDs could suggest the inclusion of a parcel, only a small portion of which met the statutory criteria for inclusion, resulting in an oversized LAMIRD.

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Conclusion: The use of the term "parcel" when describing areas that were developed and characterized by the built environment on July 1, 1990, as opposed to the term "area" in Policy 2HH-1 could result in the creation of LAMIRD boundaries that exceed the limits established by RCW 36.70A.070(5)(d) and is therefore non-compliant with the GMA.

Policy 2HH-2

> Policy 2HH-2: Rural Tourism (Type II LAMIRD) designation criteria
> A. Location Criteria. Rural Tourism may be designated on land that:
> 1. Consists of one lot, or more than one lot, and
> 2. Is not currently designated by the Comprehensive Plan as Urban Growth Areas (UGAs) or Resource Lands, and
> 3. Is characterized by the intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities
> to serve those uses, that rely on a rural location and setting, but that do not include new residential development, other than a dwelling unit accessory to the business for use by the owner-manager or caretaker.
> B. Additional Criteria The following serve as additional criteria for Rural Tourism designation:
> 1. The area may include pre-existing residential development, but not new (except for dwelling units accessory to the business for use by the owner-manager or caretaker), and
> 2. The area may serve more than the local existing & projected rural population, and
> 3. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density sprawl

Policy 2HH-2, the designation criteria for Type II LAMIRDs, refers to "areas" in several parts of the criteria. Futurewise notes that RCW 36.70A.070(5)(d)(ii) limits Type II LAMIRDs to a "lot" or "lots." Since areas may extend beyond lots, Policy 2HH-2 violates the GMA, it asserts.

The County argues that read as a whole, it is clear that this Policy is consistent with the GMA.

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The Board concludes that if the concern is that this language fails to contain or minimize the LAMIRD, read in context, this concern is not well founded. RCW 36.70A.070(5(d)(iv), which addresses measures to address and minimize LAMIRDs, and which applies to all LAMIRDs, including Type II LAMIRDs, uses the term "the existing area or uses". Clearly, the limitation of RCW 36.70A.070(5)(d)(ii) is not negated by the term "area" in Policy 2HH-2.

Conclusion: The Board concludes that Petitioner has not demonstrated that Policy 2HH-2 violates the GMA.

Policy 2HH-3A.2.a

> Rural Business (Type III LAMIRD) designation criteria
>
> A. Location Criteria. Rural Business may be designated on land that:
> 1. Is not currently designated by the Comprehensive Plan as Urban Growth Areas (UGAs) or Resource Lands, and
> 2. Consists of a lot or small group of lots that either:
> a. Contained past or current nonresidential uses and was located within a commercial, manufacturing, or industrial zoning district at the time of original county initiated designation

Petitioners and Participants on remand challenge Policy 2HH-3A.2.a. because it refers to both "past and current" isolated nonresidential uses and therefore does not require that the nonresidential uses be current and isolated. It recommends that the words "past or" be deleted. The County acknowledges this language was a remnant of a previous draft and the County agrees that the reference to past uses is not appropriate.

Conclusion: The reference to past uses in Policy 2HH-2 is not consistent with RCW 36.70A.070(5).

Policy 2HH-3

> Policy 2HH-3: Rural Business (Type III LAMIRD) designation criteria
> A. Location Criteria. Rural Business may be designated on land that:

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1. Is not currently designated by the Comprehensive Plan as Urban Growth Areas (UGAs) or Resource Lands, and
2. Consists of a lot or small group of lots that either:
a. Contained past or current nonresidential uses and was located within a commercial, manufacturing, or industrial zoning district at the time of original county initiated designation, or
b. Allow for new development of isolated cottage industries and isolated small scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents.
B. Additional Criteria.
1. A Rural Business designation on a lot or small group of lots containing nonresidential uses should be separated from other LAMIRD designations, regardless of type, by no less
than one-half mile by public road, except where the other LAMIRD is separated by a major physical feature such as a water body, freeway, major road, or other physical feature.
2. In the event that the listed criteria result in the need to choose one proposed designation over another, preference is given to a proposed use that:
a. Provides the greatest number of job opportunities for rural residents.
b. Is located at a controlled public road intersection.

Policy 2HH-3B1 provides that "[a] Rural Business designation on a lot or small group of lots containing nonresidential uses should be separated from other LAMIRD designations, regardless of type, by no less than one-half mile by public road, except where the other LAMIRD is separated by a major physical feature such as a water body, freeway, major road, or other physical feature." Futurewise argues that this provision does not comply with the GMA because it uses "should" instead of mandatory language such as "shall" and further it does not require that the Type III LAMIRDs are to be isolated from commercial uses in urban growth areas. Finally, it notes that Policy 2HH-3B1 also allows commercial developments if "separated by a major physical feature such as a water body, freeway, major road, or other physical feature" and that consequently Type III LAMIRDs can be across streams, a water body, from each other, on all four sides of a freeway interchange, across a "major road," or across from some "other physical feature," which Futurewise claims is an overly broad term.

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The County again responds that the use of the word "should" is proper in a Comprehensive Plan, as it is a blueprint or a guide - it is not a regulation.[127] In addition, the County argues that, while the GMA requires such uses to be isolated, it does not define that term and clearly does not require that these LAMIRDs be separated by any particular distance or provide how that separation must occur.

While the Board agrees with the County that generally there is no prohibition on the use of the word "should" in Comprehensive Plan policies, its use in this context fails to adequately ensure that intensification of development on lots containing nonresidential development, cottage industries and small-scale businesses in Type III LAMIRDs are "isolated" as required by RCW 36.70A.050(5)(d)(iii). The imperative "shall" is required.

In response to Futurewise's challenge to Policy 2HH-3B.1. on the grounds that it allows Type III LAMIRDs to be separated by major physical features, the County notes that throughout the descriptors for these LAMIRDs, they are described as "isolated" and, in Policy 2LL-1, they are specifically required to be consistent with RCW 36.70A.070(5)(d)(iii).

Taken as a whole, these provisions require that, whether the separation is by distance or major physical feature, these LAMIRDs need to be "isolated" as the GMA requires. The meaning of "isolated" was discussed by this Board in *Better Brinnon Coalition v. Jefferson County*:[128]

> Our inquiry does not end there, however. We must still decide what it means for the uses to be isolated. Participant argues that the term "isolated" must "at least include the notion that the new (d)iii LAMIRD is discontinuous from other commercial development"…The dictionary indicates that the derivation of the word "isolate" comes from the Latin "insula" meaning "island." "Isolate" is defined as "to set apart from others; place alone." Webster's New World Dictionary of the American language, College Edition. An isolated use, then, must be one that is

[127] *Dry Creek Coalition v. Clallam County*, WWGMHB No. 08-2-0033, FDO (6/12/09), pp. 14-15
[128] WWGMHB No. 03-2-0007, Compliance Order (6/23/04), p 4

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> set apart from others. The legislature's use of the term "isolated" for both cottage industry and small-scale businesses demonstrates an unambiguous intention to ensure that any commercial uses established by the mechanism of a type (d)(3) LAMIRD be set apart from other such uses.

Futurewise has not demonstrated that pursuant to Policy 2HH-3B1, Type III LAMIRDs would not be adequately "isolated" or set apart by either distance or a major physical feature.

Conclusion: In the context of the requirements of RCW 36.70A.070(5)(d)(iii), Petitioner has demonstrated that Policy 2HH-3.B.1, by reason of its use of the phrase "*should be separated"* fails to sufficiently ensure that certain uses in Type III LAMIRDs are isolated as required by the Act. However, Petitioner has failed to demonstrate that the physical features cited in the Policy as the means by which these uses are isolated fail to comply with the Act.

Policy 2JJ-4

> Policy 2JJ-4: Development or redevelopment within Rural Communities should be consistent with the character of the existing area and consistent with the size, scale, use, or intensity of the development that existed on July 1, 1990.

Futurewise points out that RCW 36.70A.070(5)(d)(i)(C) provides that "[a]ny development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas." Futurewise argues that Policy 2JJ-4, violates this requirement because it uses "should be consistent" and the GMA uses "shall."

While the Board generally agrees with the County's position that the use of the word "should" is proper in a Comprehensive Plan, Policy 2 JJ-4 presents an example where the use of the imperative "shall" is required. Goal 2JJ is to "Designate areas of more intensive rural development that existed on July 1, 1990 as Rural Communities." The associated Policies seek to implement that Goal by requiring that:

> Policy 2JJ-1: Areas designated as Rural Communities **shall meet the criteria stated in this chapter and the requirements of RCW**

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> **36.70A.070(5)(d)(i),** which describes limited areas of more intensive rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, including necessary public facilities and public services to serve the limited area. (emphasis added)
>
> Policy 2JJ-2: Boundaries of Rural Communities **shall meet the criteria stated in this chapter, and the requirements of RCW 36.70A.070(5)(d)(iv),** which requires limited areas of more intensive rural development to be clearly identifiable and contained within a logical outer boundary delineated predominately by the built environment as it existed on July 1, 1990. (emphasis added)
>
> Policy 2JJ-3: Additional Rural Communities shall not be designated, nor **shall boundaries of Rural Communities be changed unless the area of the proposed addition meets the criteria stated in this chapter, and requirements of RCW 36.70A.070(5)(d) .** Designated Resource Lands should not be redesignated as Rural Communities. (emphasis added)

The County appropriately established as Policies, that Rural Communities LAMIRDs would meet the requirements of RCW 36.70A.070(5)(d). It had no reservations using the mandatory "shall" despite the fact that these Policies appear in a guidance document, no doubt because these policies reflect the mandates of the Act. Policy 2JJ-4 which requires that Rural Communities should be "consistent with the character of the existing area and consistent with the size, scale, use, or intensity of the development that existed on July 1, 1990" likewise restates the mandate of RCW 36.70A.070(5)(d). It is no less a restatement of a statutory requirement than the three Policies that preceded it. The use of "should" in this context is inconsistent with the County's other Policies under Goal 2 JJ and suggests a lesser standard for consistency of Rural Communities with the surrounding area.

As noted with apparent approval by the State Supreme Court in *Gold Star*[129], this Board has pointed out in the past that while it is not necessary for plan provisions that establish

[129] *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723 , 730-31 (2008).

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LAMIRDs to use the exact same words as RCW 36.70A.070(5)(d), plan provisions for establishing LAMIRDs must utilize the same *criteria* that are set out in the Act.

Conclusion: The use of the word "should" in Policy 2JJ-4 restating the requirement of a Rural Community LAMIRD to be consistent with the size, scale, use, or intensity of the development that existed on July 1, 1990 is clearly erroneous.

Rural Uses and Resorts

Futurewise Issue 1d: *Do the policies related to rural uses and resorts including Policies 2B-2, 2B-4, and 2FF-4 violate RCW 36.70A.070(5), RCW 36.70A.070(5)(d), RCW 36.70A.360, and RCW 36.70A.362?*

Discussion

The Board will consider the challenged Policies in turn.

Policy 2B-2

> Policy 2B-2: New large-scale resort development in rural areas outside of UGAs and outside established resort areas should only be permitted as Master Planned Resorts and only when substantially in compliance with these policies and with RCW 36.70A.360.

Futurewise claims Policy 2B-2 violates the Growth Management Act in two respects: First, new large-scale resorts even within established resort areas need to comply with the GMA requirements for master planned resorts. RCW 36.70A.362 specifically provides that "[c]ounties that are required or choose to plan under RCW 36.70A.040 may include existing resorts as master planned resorts …." Yet, Policy 2B-2 exempts "established resort areas" from this requirement. Second, Futurewise argues, the policy only requires "substantial compliance" with RCW 36.70A.360's master planned resort requirements.

The County concedes that Policy 2B-2 could perhaps be more artfully worded, but maintains that the word "new" modifies all large-scale resort areas, both brand new resorts and mere new additions to established resorts. Both of these "expansions" could request status as a Master Planned Resort under the Comprehensive Plan, it argues. The County contends

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use of the word "should" is completely appropriate in this situation because the County is making a commitment only to allow a project to pursue a designation as a Master Planned Resort; the County is not committed to designating each and every application making such a request. The word "shall" in this case would imply that approval by the County was required.

While the Board concludes that Futurewise has not demonstrated that the County's use of the word "should" in this Policy amounts to clear error, the Board agrees that it is not clear what the word "new" modifies and to the extent this Policy exempts "established resort areas" from the requirements of RCW 36.70A.362, it is clearly erroneous.

Conclusion: The Board concludes that Futurewise has not demonstrated that the County's use of the word "should" in this Policy amounts to clear error. The Board concludes that to the extent this Policy exempts "established resort areas" from the requirements of RCW 36.70A.362, it is clearly erroneous.

Policy 2B-4

> Policy 2B-4: New resort development and Master Planned Resorts should be developed consistent with the development regulations established for critical areas.[130]

Policy 2B-4 provides that "[n]ew resort development and Master Planned Resorts should be developed consistent with the development regulations established for critical areas." Futurewise argues that since the GMA uses "shall", the use of "should" in this policy violates the GMA. Further, it argues "should" is the sort of conditional language the Supreme Court of Washington faulted in the *Kittitas County* decision where the Court quoted GPO 8.13 which provided that "[m]ethods other than large lot zoning to reduce densities and prevent

[130] It does not appear that the language of this Policy was amended. The County did not raise an objection to a challenge to an unamended provision, and for that reason alone the Board addresses this Policy.

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sprawl *should be* investigated" as an example of policy language that violated the GMA by not protecting rural character.[131]

The County acknowledges that RCW 36.70A.070(5)(c)(iv) requires the rural element to include measures that apply to rural development and these measures must protect critical areas (as provided in RCW 36.70A.060), surface water and ground water resources. However, the County states Futurewise ignores the basic rule of statutory construction that requires reading the Plan as a whole. The County maintains that Policy 2B-4 is an additional overlay for resort areas; it is not a stand-alone policy. It further argues the use of the word "should" in this case is not an exemption from compliance, but a recognition that some critical area development requirements would apply and others would not. The use of the word "shall" in this instance could be argued to extend critical area regulations to these resorts that would otherwise not apply.

Unlike certain other policies at issue which seek to mirror language in the Act and as to which the Board has found that the use of the term "should" undermines compliance with the GMA, here, the use of "should" is a logical expression of the policy that application of critical areas regulations to a Master Planned Resort development will depend on whether and how that particular project impacts critical areas. Futurewise has not demonstrated that, due to the use of the word "should" in this Policy, a project could gain development approval exempting it from complying with otherwise applicable critical area regulations.

Conclusion: Petitioner has failed to demonstrate that County Planning Policy 2B-4 violates the GMA.

Policy 2FF-4

> Policy 2FF-4: Allow home-based occupations, cottage industries and small scale tourist and recreational uses throughout the rural area provided they do not

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[131] 172 Wn.2d at 163

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> adversely affect the surrounding residential uses, agricultural uses, forestry uses, or rural character.

Futurewise points out that RCW 36.70A.070(5)(d)(ii) limits tourist and recreational uses in the rural area to "[t]he intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development." However, Futurewise argues, newly adopted Policy 2FF-4 does not require that those uses "rely on a rural location and setting" and "not include new residential development." Thus, it alleges this policy violates the GMA.

The County argues that Futurewise ignores the actual wording of the policy and would again require that the Plan policy be read in a vacuum. The Goal 2F deals with economic opportunities in the rural areas. The Policy reads:

> Policy 2FF-4 Allow home-based occupations, cottage industries and small scale tourist and recreational uses throughout the rural area provided they do not adversely affect the surrounding residential uses, agricultural uses, forestry uses, or rural character.

RCW 36.70A.070(5)(d)(ii) details the specific uses that can be used to support a LAMIRD. The Board finds that Policy 2FF-4 is not a policy dealing with LAMIRDs, nor is it an attempt to create a limited area of more intense rural development through this policy. Instead, it appears that Policy 2FF-1 (not challenged in this appeal) addresses small scale businesses and cottage industries in LAMIRDs. Policy 2FF-4, on the other hand, is a recognition of the type of economic, small scale uses that could be allowed within the rural area. The Board does not find that it violates the GMA.

Conclusion: Petitioner has failed to demonstrate that County Planning Policy 2FF-4 violates the GMA.

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Expansion of Urban Services into Rural Areas

Futurewise Issue 1e: *Do Policies 2EE-4, 2EE-8, 5P-3, and 5T-1, that fail to prevent the expansion of urban services into the rural area violate RCW 36.70A.110(4)?*

Discussion

RCW 36.70A.110(4) provides:

> (4) In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

The Board again considers the challenged Policies in turn.

Policy 2EE-4

> Policy 2EE-4: Prohibit extension or expansion of municipal public sewer systems outside urban growth areas or LAMIRDs except where it is necessary to protect public health, safety and the environment, and when such services are financially supportable at rural densities and do not permit urban development.

Newly amended Policy 2EE-4 applies the limitations of RCW 36.70A.110(4) to "municipal public sewer systems." Because it does not address all urban governmental services, Futurewise alleges the policy violates the GMA.

The County argues that there are sections within the Plan that specifically address the requirement of *RCW 36.70A.110(4)*. It points to Policy 5C-8 which provides:

> Policy 5C-8 Extension of urban governmental services will be confined to areas planned for urban development and be consistent with the optimal land use and urban growth area plan.

This policy specifically states urban services will be confined to areas planned for urban development.

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The County argues that nothing in the GMA states that the urban growth planning requirements of RCW 36.70A.110(4) must be restated in the rural element and that the County has clearly complied with this RCW by the referenced policy above. The County's compliance with this RCW is bolstered in several other places within areas of the Plan already found in compliance including Policy 2N-4[132] and Policy 2Q[133].

The Board finds that Policy 2EE-4 merely repeats the requirement of RCW 36.70A.110(4) prohibiting extension or expansion of municipal public sewer systems outside urban growth areas or LAMIRDs except where it is necessary to protect public health. This restatement of the RCW requirements with specific mention of sewer only adds to the Plan's compliance and does not negate or conflict with the statement of Policy 5C-8[134]. Policy 2EE-4's consistency with RCW 36.70A.110(4) is further seen by noting that Policy 2EE-1 recognizes that "domestic water systems, volunteer fire protection, … and public utilities typically associated with rural development" are appropriate services in rural areas. Thus Policy 2EE-4 cannot be read to suggest that other municipal services, aside from sewer, are permitted to be extended outside UGAs and LAMIRDs.

Conclusion: Petitioner has failed to demonstrate that County Planning Policy 2EE-4 violates the GMA.

Policy 2EE-8

Policy 2EE-8: Public services and public facilities necessary for rural commercial

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[132] Whatcom County Comprehensive Plan at 2-19. Policy 2N-4: Ensure that cities or other service providers do not extend sewer or urban levels of water service to serve new areas of urban densities outside urban growth areas unless emergency or health hazards exist.

[133] Whatcom County Comprehensive Plan at 2-19. Goal 2Q GOAL 2Q: Ensure that development in Unincorporated Residential/Recreational Urban Growth Areas not associated with a City is of an urban level and proceeds in a logical and efficient manner.

[134] Ibid. Utility Policies: Policy 5C-8: Extension of urban utility services will be carefully staged in order to discourage new development in areas that are premature in terms of planning, timing and funding.

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> and industrial uses shall be provided in a manner that does not permit low-density sprawl. Uses may utilize urban services that previously have been made available to the site.

The allowances for necessary public facilities and services in rural areas that are not rural governmental services are limited to LAMIRDs designated in compliance with RCW 36.70A.070(5)(d). Because Policy 2EE-8 does not limit those services to properly designated LAMIRDs, Futurewise claims this violates the GMA.

Here again, the County argues that Policy 2EE-8, which refers to the use of existing urban services that are available to a site, does not conflict with the restrictions on extension or expansion of services under RCW 36.70A.110(4).

The Board finds that nothing in Policy 2EE-8 which permits the use of *existing* services violates RCW 36.70A.110(4) which states that "it is not appropriate that urban governmental services be *extended or expanded* in rural areas . . . " (emphasis added). The Board will not add limitations to the use of existing urban services beyond those thought appropriate by the Legislature. [135]

Conclusion: Petitioner has failed to demonstrate that County Planning Policy 2EE-8 violates the GMA.

Policy 5P-3 and Policy 5T-1

> Policy 5P-3: Discourage extension of urban levels of water service to areas not designated as urban growth areas or Rural Communities, except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

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[135] The Board notes that the presence of a water or sewer line is not the same as "urban services … made available to the site." Availability of service to the site requires a water or sewer purveyor with supply and treatment capacity that it has agreed to provide to the site for the proposed intensity of uses pursuant to its approved water or sewer plan.

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> Policy 5T-1: Discourage extension of sewer lines in areas not designated as urban growth areas or Rural Communities, except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

Newly amended Policies 5P-3 and 5T-1 "[d]iscourage extension of urban levels of water (Policy 5P-3; "sewer" in the case of Policy 5T-1) service to areas not designated as urban growth areas or Rural Communities …." Futurewise argues that "discouraging" violates the GMA because it does not require compliance with RCW 36.70A.110(4).

Policy 5P-3, relating to the extension of urban levels of water service and Policy 5T-1, relating to the extension of sewer lines incorporate the specific exemption language of RCW 36.70A.110(4). The County argues and the Board agrees, that the mere fact that they begin with the word "discourage" is not in and of itself a violation of the statute when RCW 36.70A.110(4) itself starts with the caveat "in general". In addition, Policy 5T-1[136] within the Utility Element, when applied to the Rural areas, must be read consistently with the more restrictive requirements of Policy 2EE-4, which as noted above, is a Policy to "**Prohibit** extension of municipal public sewer systems outside urban growth areas or LAMIRDs . . ." (emphasis added.)

Conclusion: Petitioner has failed to demonstrate that County Planning Policies Policy 5P-3 or Policy 5T-1(when read consistently with Policy 2EE-4) violate the GMA because Policy 2EE-4 expressly prohibits the extension of municipal public sewer systems outside urban growth areas or LAMIRDs.

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[136] Ibid. Policy 5T-1: Discourage extension of sewer lines in areas not designated as urban growth areas or Rural Communities, except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

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Rural Designation Descriptor

Futurewise Issue 1f: *Do the Rural designation descriptor, future land use map, and related policies, including Policies 2GG-2, 2GG-3, 2GG-4, and related narrative violate RCW 36.70A.070?*[137]

Hirst Issues 1 and 3: (stated in full, above)

Discussion

RCW 36.70A.070(5) requires each county to include in its comprehensive plan a rural element. RCW 36.70A.070(5)(b) provides:

> The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall *provide for a variety of rural densities*, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses…

Petitioners Futurewise and Hirst challenge the County's Rural Designation text and policies [Policies 2GG-1 through 2GG-8] for failing to assure a variety of rural densities. These Petitioners also challenge the Comprehensive Plan Designation Descriptors, accompanying the land use map, for articulating locational criteria that fail to contain and control rural development.

Futurewise cites to the Supreme Court's *Kittitas* decision: "Among other required provisions in the rural element of a comprehensive plan, the GMA states that '[t]he rural element shall provide for a variety of rural densities.'"[138] It argues that adopted Policy 2GG-4 does not "assure the provision of a variety of rural densities."[139] Policy 2GG-4 provides in full that "[u]ses and densities within the Rural designation <u>should</u> reflect established rural character.

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[137] Futurewise includes in its Issue 1f argument constituting a challenge to Policy 2GG-5's use of the term "minimize" instead of "protect" . However, County Plan Policy 2GG-5 was not challenged in Issue 1f and it will not be considered here, although other challenges to the language of this Policy are considered elsewhere in this Order.

[138] 172 Wn.2d at 167 citing RCW 36.70A.070(5)(b).

[139] 172 Wn.2d at 169. "A plain reading of the statute indicates that the Plan itself must include something to assure the provision of a variety of rural densities."

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Rezones within the Rural designation should be consistent with the established rural character and densities in the general area of the proposed rezone."[140] The County's use of "should" means that designations may depart from this policy, Futurewise states, failing to assure the provision of a variety of rural densities.

Policy 2GG-3 provides for the Rural Residential Density Overlay:

> In the Whatcom County Code, the Rural and Rural Residential zoning districts should include Rural Residential Density Overlays that may be applied to areas within the Rural designation where smaller-lot rural residential development has already occurred. The overlay should allow for infill development with lot sizes consistent with those of surrounding lots, where public water service is available. The overlay should limit eligibility of lots based on the percentage of surrounding lots that are developed, and should establish a maximum density that may be achieved using the overlay. The Rural Residential Density Overlays should not be expanded into areas where smaller-lot development has not occurred; such expansion is not consistent with maintaining the traditional character of the surrounding rural areas.[141]

Here again, Futurewise argues that "should" does not "assure," and therefore it fails to comply with the GMA. With regard to residential density, Hirst argues that zoning that allows one dwelling unit per two acres fails to limit or contain rural residential densities.

Policy 2GG-2 similarly states "more intensive development should be contained in [LAMIRDs] unless justified by the existing character of the area." Futurewise argues that Policy 2GG-2 presents the same "should" problem as Policies 2GG-4 and 2GG-3 because the use of "should" and "may" prevents assuring a variety of rural densities.

With regard to its use of the word "should", the County again maintains that the use of this word in and of itself does not require a finding of non-compliance, as the CP is to be read as

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[140] Ex. D-003A, Whatcom County Ordinance 2011-013 Exhibit A: Whatcom County Comprehensive Plan (track changes version showing all changes from existing Comprehensive Plan text) p. 11 of 29 emphasis added.
[141] Ex. D-003A, Whatcom County Ordinance 2011-013 Exhibit A: Whatcom County Comprehensive Plan (track changes version showing all changes from existing Comprehensive Plan text) pp. 10 – 11 of 29 emphasis added.

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a whole and is to provide a blueprint for implementation. *State v. Sommerville, supra*. The Court in *Kittitas* was looking for assurance that the rural element requirements would be achieved and not for a specific density calculation or number, the County argues.

The County maintains that Policy 2GG-4 is a clear directive to the County stating, "[p]rovide a variety of residential choices at rural densities which are compatible with the character of each of the rural areas." It argues that to state that there is no guidance on where various densities will go, ignores the provisions of the section of the Plan that define Regions of Whatcom County. [142] This section was specifically placed into the Plan to acknowledge, "people living in different parts of the county have different priorities and understandings of what constitutes rural and urban lifestyles." Several policies are provided within that section to guide development in different areas of the County. For example:

> Policy 2L-1: Use the subarea planning process to identify and support distinctions among different areas of the county.
> Policy 2L-2: Retain and periodically update the adopted Subarea Plans ….

The Comprehensive Plan Designation Descriptors are conditioned by the statement, "[t]hese descriptors are intended to be general in nature. More specific criteria and explanation will be incorporated in the subarea plans."

The County argues that its subarea plans provide the guidance necessary to implement Policy 2GG-1. The County points out that the large majority of the rural area falls into two different subarea plans. Both of these plans address the locational criteria for the various rural zones, R-2, R-5 and R-10. The locational criteria are specific, according to the County, and provide the necessary guide for the designation of various densities.

The Board reads the Supreme Court *Kittitas* decision as requiring that the rural element itself contains provisions ensuring that applications for rezones do not result, over time, in a

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[142] Ex. D-003 (Ordinance No. 2011-013, 5/10/11, p. 3).

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uniform low-density sprawl. In the section on measures to contain and control rural development, above, the Board noted several modifications by which the County could incorporate containment of the R2A and RRDO designations. The Board notes much of the rural area is designated R5A or R10A. In addition, a variety of larger lot sizes are created and protected by the APO Plan provisions. 28,000 acres of the rural designated areas are subject to the APO provisions, which require minimum parcels of 20 acres. Therefore, 21,000 acres, or seventy five percent, of the APO will be protected with lot sizes of fifteen acres[143] and above.

The Board agrees with the County that these provisions, when brought into compliance by the adoption of appropriate "measures" as indicated above and in the context of sub-area plans, assure a variety of rural densities.

Conclusion: Petitioner has failed to demonstrate that Policies 2GG-2, 2GG-3, 2GG-4, and related narrative violate RCW 36.70A.070(5).

D. Development Regulations

Petitioners challenge a number of the amended provisions of the Whatcom County Code (WCC).

Futurewise Issue 2c: *Does WCC 20.82.030(4) fail to prevent the expansion of urban services outside urban growth areas and limited areas of more intense rural development in violation of RCW 36.70A.110(4)?*

Discussion

Futurewise argues that newly amended WCC 20.82.030(3)[144] and (4) allow sewers as a conditional use without the measures required by RCW 36.70A.110(4) and .070(5)(d).[145]

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[143] Clustering is allowed on five acres of each 20-acre parcel.
[144] WCC 20.82.030(3) was not challenged in Futurewise's Petition for Review and the Board will not address Futurewise's challenge to that code section.
[145] A challenge under RCW 36.70A.070(5)(d) was not raised in the PFR and will not be considered.

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In response, the County argues that while WCC 20.82.030(4) allows sewers as conditional uses, this code provision applies to the "extension" of sewer lines. The provision does not authorize the connection of rural properties to that line. The County argues that the specific rationale for this development regulation is that some sewer lines, like those maintained and operated by Birch Bay Water and Sewer District, may need to cross through county areas in order to service areas they can legally serve. In addition, the County points out, the development regulation specifically states that in the event the line is not within a LAMIRD or a UGA, consistent with the Comprehensive Plan, then it is a conditional use which has as its first requirement for approval, consistency with the Plan.

RCW 36.70A.110(4) provides, in relevant part; "In general, it is not appropriate that urban governmental services be extended or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment". In *Thurston County v Cooper Point Association*,[146] the Court upheld the Western Board's finding that a sewer line extension violated RCW 36.70A.110(4). The county had authorized a 4-mile sewer extension to serve two pre-GMA developments whose sewer systems were projected to fail. The Court found the area was rural, and ruled that the GMA supported a narrow reading of the exception for public health and safety as better carrying out the legislature's intent of protecting rural character. The Board has previously found that sewer lines extending beyond the UGA into the rural area to re-connect with the UGA or another UGA is not prohibited under the GMA, so long as connections to such line in the rural area are prohibited.[147]

The Board finds that WCC 20.82.030(4) violates this provision of the GMA because, while the County argues that some sewer lines may need to cross through county areas in order

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[146] 148 Wn.2d 1, 57 P.3d 1156 (2002).
[147] (Citing *Gain v. Pierce County*, CPSGMHB Case No. 99-3-0019, FDO (Apr. 18, 2000); *Heikkila v. City of Winlock*, WWGMHB Case No. 04-2-0020, Order on Motions (Jan. 10, 2005), at 6.)

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to service areas they can legally serve, this code section does not provide an appropriate limitation preventing such lines to hook up to rural lots. Further, nothing in WCC 20.82.030(4) limits its application to the "limited circumstances" set forth in RCW 36.70A.110(4).

Conclusion: Petitioner has demonstrated that WCC 290.82,030(4), to the extent it would permit the expansion of urban governmental services outside LAMIRDs violates RCW 36.70A.110(4).

Futurewise Issue 2d: *Do WCC 20.32.253, 20.32 WCC, Residential Rural (RR) District; and Chapter 20.36 WCC, Rural (R) District; violate RCW 36.70A.070 and RCW 36.70A.040 because they fail to guide the location of the various rural zones?*

Discussion

Futurewise argues that neither the Comprehensive Plan nor the development regulations provide real guidance for the location of rural zones and therefore these regulations do not provide for a variety of rural densities as required by RCW 36.70A.070(5).

The Board finds that Futurewise's claim that WCC 20.32.253 is a violation of the GMA's requirement to assure a variety of rural densities, relies entirely on the statement that both RR-5A and RR-10A are allowed throughout the rural areas. The County acknowledges that this is a true statement but argues that it does not follow that the existing zoning can be changed without consideration of any factors. In order to change zoning, a property owner must apply for a re-zone, at which time the first consideration of the rezone is whether the proposal is consistent with the Plan.

As the Supreme Court noted in *Thurston County:*[148] "the GMA does not dictate a specific manner of achieving a variety of rural densities." In Whatcom County, LAMIRD designations such as Rural Community, Rural Tourism and Rural Business all provide

[148] 164 Wn.2d at 360.

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varying densities. In particular, adopted subarea plans for areas such as Lynden Nooksack Valley and Birch Bay Blaine contain zoning density criteria that are applied to specific areas of the County. Thus the development regulations appear to provide the necessary locational criteria to ensure a variety of rural densities.

Futurewise only argues that WCC 20.32.253 violates GMA provisions by failing to guide the location of the various rural zones; Futurewise has not provided any argument relative to WCC 20.36 and therefore appears to have abandoned the allegation of non-compliance for that development regulation. Futurewise incorporates by reference their arguments under section 1f yet that section is devoid of any mention of WCC 20.36 and this argument is deemed abandoned.

Conclusion: Futurewise has failed to demonstrate that WCC 20.32.253 violates the GMA. Futurewise presented no argument with regard to Chapter 20.36 WCC, and its allegation of error as to that section is deemed abandoned.

Futurewise Issue 2e: *Does the definition of Rural Business in WCC 20.97.356 violate RCW 36.70A.070(5)(d) and RCW 36.70A.040?*

Discussion

Futurewise argues that the newly adopted definition of "Rural Business" in WCC 20.97.356 fails to meet any of the requirements for a Type III LAMIRD in RCW 36.70A.070(5)(d)(iii).

In response the County argues that the Rural Business definition in WCC 20.97.356 is merely a definition, not a zoning category and in large part it is irrelevant to the zoning provisions. The definition that is implemented is the definition in the Comprehensive Plan for purposes of designating areas as Rural Business. It notes that in the event of a conflict between the Plan and the zoning code, the Plan controls. Therefore, it argues, there is no error or violation of the GMA by including this definition in the zoning code.

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The definition of "Rural Business" in the development regulation WCC 20.97.356 states:

> **20.97.356 Rural business.**
>
> "Rural business" means a business that provides limited commercial services and job opportunities for rural residents, and is a specific designation under the Comprehensive Plan. Typical uses within a rural business designation include the production or manufacturing of goods; the production, repair and servicing of specialized tools and equipment; and the provision of services, including professional, management, consulting, construction, and repair services. Although rural in nature, the uses within the rural business designation are typically greater in intensity than cottage industries within the Rural Zone District. (Ord. 2011-013 § 2 Exh. B, 2011).

When comparing the definition of Rural Business in the County's Development Regulations[149] with the County's Comprehensive Plan use of that term, the Board finds contradictions between the two documents that amount to an inconsistency in violation of RCW 36.70A.040.

The County's Comprehensive Plan provides a general overview of LAMIRDs. It explains that in Whatcom County a Type III LAMIRD is defined as "Rural Business".[150] The County states that the purpose of LAMIRDS is "to place limits on more intensive development and prevent it from adversely affecting the character of the surrounding area". In this same introductory section, the County goes on to say that "Rural Business designations apply to lots that contain isolated small-scale businesses". Likewise, the criteria in the Comprehensive Plan Policy 2HH-3(A) (2) place limitations on Rural Business by requiring such businesses to be located on "a lot or small group of lots" or to be isolated cottage or small scale businesses. In addition, the County further defines what they mean by "isolated" such as distances from other Type III LAMIRDs or physical separations. Finally, the County's Comprehensive Plan reinforces the concepts of isolated businesses when it

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[149] County Exhibit B: WCC Title 20 Proposed Amendments at 64
[150] County Exhibit A: Whatcom County's Comprehensive Plan at 11

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states "to ensure that these uses remain isolated and do not lead to strip development", the County requires criteria including spacing requirements.[151]

When the Board compared these statements from the Comprehensive Plan with the definition in the Development Regulation WCC 20.97.356 Rural Business, it found no such limitation to "lots containing isolated small-scale business" nor physical separations required between Rural Businesses. The County argues its comprehensive plan would prevail over the development regulations, but the GMA requires internal consistency under RCW 36.70A.040 (3)(d). In this case, the Comprehensive Plan defines Rural Business as areas with "lots containing isolated small-scale business" whereas the Development Regulations contain no such limitations.

Conclusion: The Board concludes that Futurewise has demonstrated the definition of rural Business in WCC 20.97.356 is inconsistent with the County's treatment of Rural Business in its Comprehensive Plan and therefore violates RCW 36.70A.040(3)(d).

E. LAMIRDS

Criteria in the Development Regulations

Futurewise Issue 2b: *Do Chapter 20.32 WCC, Residential Rural (RR) District; Chapter 20.36 WCC, Rural (R) District; Chapter 20.59 WCC, Rural General Commercial (RGC) District; Chapter 20.60 WCC, Neighborhood Commercial Center (NC) District; Chapter 20.61 WCC, Small Town Commercial (STC) District; Chapter 20.63 WCC, Tourist Commercial (TC) District; Chapter 20.64 WCC, Resort Commercial (RC) District; Chapter 20.67 WCC, General Manufacturing (GM) District; Chapter 20.69, WCC Rural Industrial - Manufacturing (RIM) District; Chapter 20.37, Point Roberts Transitional Zoning District; and Chapter 20.72 WCC, Point Roberts Special District; fail to include the measures and regulations required by RCW 36.70A.070(5), RCW 36.70A.070(5)(c), RCW 36.70A.070(5)(d), RCW 36.70A.070(5)(c)(v), RCW 36.70A.040, RCW 36.70A.060, and RCW 36.70A.110(1) including measures to protect rural character and the rural area, compliant LAMIRD regulations, and adequate buffers adjacent to and protections for*

[151] Exhibit A: Whatcom County Comprehensive Plan (proposed amendments) at 16

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agricultural lands of long-term commercial significance including the Agriculture Protection Overlay Zone?

Bellingham Issue 2: *Did the amendments creating LAMIRDS violate GMA's requirements for comprehensive countywide planning in the rural area, under RCW 36.70A.020(1), .020(2), .020(10), .020(12), 040, .070 (preamble), .070(3), .070(5)(a-c), .070(6), .110(1), .120, and the specific requirements and limitations for identification and designation of LAMIRDS in RCW 36.70A.070(5)(d) in the following locations, thus, among other things, resulting in uncoordinated and piecemeal planning that makes it very difficult for the City to expand its UGA at urban densities and provide infrastructure for orderly and contiguous growth at its borders*:

a. *Smith/Guide;*
b. *Laurel;*
c. *Fort Bellingham;*
d. *North Bellingham;*
e. *Cain Lake;*
f. *Hinotes Corner;*
g. *Sudden Valley (Lake Whatcom);*
h. *Van Wyck;*
i. *Wiser Lake;*
j. *Blue Canyon;*
k. *Emerald Lake*

Bellingham Issue 4: *Did the amendments adopting LAMIRD criteria for Type I, II and III LAMIRDS violate GMA's requirements for comprehensive countywide planning in the rural area, under RCW 36.70A.040, .070, the specific requirements and limitations for identification and designation of LAMIRDS in RCW 36.70A.070(5)(d), and Countywide Planning Policy B-3?*

Bellingham Issue 6: *Did the amendments to the Whatcom County Zoning Code violate GMA's requirements for implementing development regulations under RCW 36.70A.040, and .070(preamble) and .070(5), .110(1), and .120, including but not limited to the following zoning code amendments:*

- *WCC § 20.36.252 Rural Residential Overlay;*
- *WCC Ch. 20.59 Rural Commercial District;*
- *WCC Ch. 20.60 Neighborhood Commercial District;*
- *WCC Ch. 20.61 Small Town Commercial District;*
- *WCC Ch. 20.63 Tourist Commercial District;*
- *WCC Ch. 20.64 Resort Commercial District;*
- *WCC Ch. 20.67 General Manufacturing District; and*
- *WCC Ch. 20.69 Rural Industrial Manufacturing District*

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Bellingham Issue 9: *Did the amendments violate RCW 36.70A.020(12), .040(3) and .120, which require that: (a) implementing development regulations be consistent with comprehensive plan policies; (b) infrastructure be in place at the time of development; and (c) planning decisions be consistent with budget decisions and adopted capital facility plans, because the amendments allow development that is inconsistent with adopted utility and capital facilities plans and the amendments are otherwise inconsistent with the following policies of the Whatcom County Comprehensive Plan:*

a. *Policies 2A-1, 2A-2, 2A-6, and 2A-12;*
b. *Policy 2B-2*[152]
c. *Policies 2DD-1, 2DD-2, 2DD-7, and 2DD-8;*
d. *Policies 2EE-7, and 2EE-8;*
e. *Policies 2GG-4, and 2GG-8; and*
f. *Goal 2MM, Policies 2MM-1, and 2MM-6?*

Hirst Issue 2: *Did the County's adoption of the Ordinance, Sections 1, 2, and 3, fail to comply with RCW 37.70A.070(5), RCW 36.70A.110(1), providing that urban growth shall not occur outside urban areas; RCW 36.70A.030(15), (16) and (19), RCW 36.070.020 (Goals (1) and (2)), RCW 36.70.130(a), requiring development regulations to be consistent with and implement the Comprehensive Plan, and RCW 36.70A.070 (preamble) requiring internal consistency, because the policies, regulations and designations of Type I LAMIRDs fail to protect rural character, ensure that development or redevelopment will be consistent with the character of the existing areas, constrain development to logical outer boundaries, and minimize and contain existing areas and uses to prevent sprawl?*

Discussion

The issues in this section address how the County has chosen to deal with LAMIRDs – Limited Areas of More Intensive Rural Development. As summarized by our State Supreme Court in its remand of this matter: [153]

> Two months after the County adopted its comprehensive plan, the GMA was amended to allow limited areas of more intensive rural development (LAMIRDs) to be included in the rural element of a comprehensive plan. Areas allowed "consist of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." Counties must "adopt measures to minimize and contain the

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[152] The City has elected to not brief this issue. City Brief at 65.
[153] *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d at 727 (citations omitted)

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existing areas or uses of more intensive rural development" so that "[l]ands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl." For Whatcom County, "an existing area or existing use is one that was in existence … [o]n July 1, 1990." A county must address several circumstances when establishing the "logical outer boundary" of a LAMIRD:

(A) the need to preserve the character of existing natural neighborhoods and communities,
(B) physical boundaries such as bodies of water, streets and highways, and land forms and contours,
(C) the prevention of abnormally irregular boundaries, and
(D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl.

LAMIRDs are not intended for continued use as a planning device, rather, they are "intended to be a one-time recognition of existing areas and uses and are not intended to be used continuously to meet needs (real or perceived) for additional commercial and industrial lands." In general, planning in rural zones must "protect the rural character of the area" and "contain or otherwise control rural development."

Petitioners argue that the County fails to limit the range of uses in Type I LAMIRDs based on the existing size, scale, intensity or uses in the area and that development is not designed to serve the existing or projected rural population. With regard to Type III LAMIRDs, Hirst claims the County fails to limit them to isolated, small scale or cottage industries.[154]

Hirst claims the County's Comprehensive Plan fails to provide sufficient guidance to ensure that LAMIRDs are contained. It argues that the implementing zoning categories fail to implement the requirements of the GMA. The Rural General Commercial (RGC) zone allows uses that are not typically rural, and that did not exist in the rural areas of the County in 1990, such as bowling alleys and skating rinks, Hirst argues. Furthermore, there is no public process for determining if similar uses existed in 1990. As to the Rural Industrial

[154] Hirst Brief at 29-30.

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Manufacturing (RIM) zone, Hirst argues that it too provides for urban uses that did not exist in the County's rural areas in 1990.[155]

Futurewise argues that RCW 37.70A.070(5)(d)(i) limits allowed uses, building sizes and intensities to those that existed in 1990 in the Type I LAMIRDs, yet the 35,000 sq.ft. limit for grocery stores in WCC 20.59.322 is over three times larger than any 1990 buildings in the Rural General Commercial (RGC) District and is not "small scale".[156]

Futurewise argues that the required measures to control and contain rural development and protect rural character are absent from the Neighborhood Commercial Center (NC) District (20.60 WCC), except for a narrow 25 foot wide buffer for agriculture zones.[157]

Futurewise points out that RCW 36.70A.070(5)(d)(iii) limits uses to those that are "small scale", yet the 35,000 sq. ft. limit for buildings in a Rural Business designation in Small Town Commercial (STC) District, WCC 20.61.322, is not small scale and is out of scale with the rural area and far larger than any building that existed in 1990.[158] Here again, Futurewise argues that the required measures to control and contain rural development and protect rural character are absent from the NC District, except for a narrow 25-foot buffer for agriculture zones, and there is no limit on impervious surfaces, thus failing to provide for a rural area in which open space, the natural landscape and vegetation predominate over the built environment.

Futurewise notes that the Rural Tourism Descriptor and TC District - 20.63 WCC- contains no limit on building size, the number of buildings or the size of a Type II LAMIRD, thus failing to ensure that the uses are small-scale.[159]

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[155] Hirst Brief at 33.
[156] Futurewise Brief at 52.
[157] Futurewise Brief at 53.
[158] Futurewise Brief at 53-54
[159] Futurewise Brief at 54

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With regard to the Resort Commercial (RC) District - 20.64 WCC, Futurewise again argues that it contains no limit on building size, the number of buildings or the size of a Type II LAMIRD, thus failing to ensure that the uses are small-scale.

Futurewise argues that the 20,000 sq. ft. area limit in WCC 20.67.301 General Manufacturing (GM) District is over 4,000 square feet larger than any 1990 buildings of similar designation, thus violating RCW 36.70A.070(5)(d)(i)'s limits on allowed building sizes. It also argues that the 35,000 sq. ft. limit for buildings in a Rural Business designation is not "small scale" as required by RCW 36.70A.070(5)(d)(iii).[160]

Futurewise argues that the 22,000 sq. ft. building size limit in Rural Industrial-Manufacturing (RIM) District - WCC 20.69.301- is over 6,000 square feet larger than any 1990 buildings of similar designation, thus violating RCW 36.70A.070(5)(d)(i)'s limits on allowed building sizes. It also argues that the 35,000 sq. ft. size allowed for buildings in a Rural Business designation is not "small scale" as required by RCW 36.70A.070(5)(d)(iii).

Futurewise argues that the lands within the Agricultural Protection Overlay (APO) are agricultural lands of long term significance, yet WCC 20.38 does not assure their conservation. It asserts that WCC 20.38.060(1) allows residential development on 25 per cent, or 7,000 acres of the lands designated in the APO.

The City alleges non-rural development near the City and its UGA creates a barrier to the future expansion of the City's UGA to accommodate growth.

The City notes that the Fort Bellingham LAMIRD, the North Bellingham LAMIRD, the Smith/Guide LAMIRD, the Emerald Lake LAMIRD, and the Van Wyck LAMIRD are all surrounding the City and within a mile or less of the City limits. It asserts that none of the

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[160] Futurewise Brief at 55-56

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Type I LAMIRDs meet the basic criteria of establishing a land use pattern in 1990 that would warrant a LAMIRD.

The City also argues that a LAMIRD next to a UGA creates an impermissible barrier to expansion, and forms a "wall" of three LAMIRDs at the City's northern and eastern boundaries, directly adjacent to the Bellingham UGA. It argues that future expansion of the UGA is precluded and made unnecessarily expensive because the ground is already planned at densities that require urban services but do not provide enough urban density – as part of a UGA – that would make those services fiscally supportable.[161]

The City points out that the Central Board found, in *Tacoma v. Pierce County*[162], an area of "urban" or "suburban" development located directly adjacent to a UGA should be a candidate for a UGA expansion, not a LAMIRD. The City also points out that the Western Board concurred with this finding in *Better Brinnon Coalition v. Jefferson County*[163].

The City argues that below a certain residential density, redevelopment of small lots is very difficult. It contends that the lots in Fort Bellingham LAMIRD (zoned at RR1 and with the rural residential overlay) and North Bellingham will not be encouraged to redevelop at urban densities.

The City alleges LAMIRDs have a significant adverse impact on the City's transportation network and other infrastructure.

In particular, the City claims that Guide Meridian is already one of the most over-crowded arterials in the City. With the addition of an increased amount of heavy industrial activity zoned up the Guide north to Canada, along with the proposed Caitac hotel and golf course

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[161] City Brief at 29
[162] *(Tacoma II),* CPSGMHB Case No. 99-3-0023c, Final Decision and Order, at 8
[163] WWGMHB Case No. 03-2-0007, Compliance Order (June 23, 2004).

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home development at the edge of the City on Smith Road, near the Guide, Bellingham contends, the Guide will become even more choked with traffic than it already is today.

The City next alleges that the County's LAMIRD designations are based on inadequate capital facilities planning. The City points out that in March 2006, the City adopted Ordinance 2006-03-026 which repealed all City water service zones outside the City's UGA created by Ordinance No. 8728 and provided that the City would not extend or expand urban governmental services such as water and sewer outside the UGA unless authorized by law.[164]

The City alleges the LAMIRDs violate GMA Goal 2 prohibiting urban sprawl. The City argues that the County's failure to conduct a cumulative and countywide analysis of multiple LAMIRD designations illegally fosters patterns of urban-style growth in the rural area. Once designated, citizens in these areas will be looking for urban services that will not be available. Growth will turn into low density sprawl serviced by exempt wells and septic.

The City alleges the LAMIRDs fail to meet GMA's very specific designation criteria. The City argues that the history of the development pattern in the areas proposed for LAMIRD designation does not warrant more intensive development, because the more intensive development is 1) beyond historical levels and 2) will place demands on public service providers such as the City for water, sanitary sewer, and police protection.[165] It refers the Board to Appendix A to its brief for a description of the actual patterns on the ground.

Among other concerns, the City alleges that the County has interpreted the term "existing use" for LAMIRD designations too broadly. The existence of one building in an area that may be of a certain square footage does not justify allowing all buildings in that zone to be

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[164] City Brief at 32.
[165] City Brief at 36.

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of that square footage, it argues. The resulting intensity from such an approach is far beyond the "scale, use, or intensity" of any of these areas today, let alone on July 1, 1990. Further, it argues that the presence of water lines is not a justification historically for defining an area as appropriate for more intensive development.

The City further alleges the County has failed to coordinate with public service providers, contrary to Policies 2EE-7 and 2EE-8. The Board addresses this contention below in Section I: Intergovernmental Coordination for Services.

In response, the County argues the GMA does not limit LAMIRDs to only those uses that were in existence in 1990. "Uses" is one of several descriptors the statute uses to define the character of the area.[166] The County takes issue with the proof that the Petitioners offer to support their assertion that these specific uses did not exist, i.e. a 1989-90 Polk's Directory for Bellingham, WA (including Ferndale). The County argues this directory does not even encompass many parts of rural Whatcom County. The County argues that the Petitioners have failed to offer any evidence of what uses were in these areas in 1990, and mistakenly conclude that these specific uses are not of the same general type as the uses in 1990 and are not consistent with the character of the area based on size, scale or intensity.[167]

With regard to Hirst's argument that certain uses in the RIM zone violated the GMA on the basis that they did not exist in the County's rural area in 1990, the County argues that Petitioners offer no evidence to support this contention, let alone a contention that the listed uses are not consistent with the same general type of use.[168]

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[166] *Dry Creek Coalition and Futurewise v. Clallam County*, WWGMHB No. 07-2-0018c, Order on Motion for Reconsideration, p. 8 (6/9/2008).
[167] County Brief at 64-65.
[168] Board member Pageler would accept the Petitioners' offer of the 1989-90 Polk's Directory as competent evidence of business uses in the northwestern portion of the County in 1990. Pageler would rule the

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Hirst also challenges the allowances in WCC 20.59.320 (RGC) and WCC 20.69.300 (RIM) for "a larger size if consistent with the size, scale, use, or intensity of similar uses that existed on July 1, 1990." The County responds that in *Dry Creek*, the Board found that a performance standard that required allowed uses and conditional uses to "be similar to the use, scale, size, or intensity of the uses that existed in the area prior to or as of July 1, 1990," without numerical standards, adequately ensured compliance with RCW 36.70A.070(5)(d)(i)(C).[169] The County states the provisions challenged here are the same as the provision approved in Clallam County.

The County argues that in all of the commercial/industrial zones located in Rural Communities, it set maximum building sizes based on data reflecting the largest building sizes in each area – with area defined as that zoning district anywhere in the County.[170] Thus, in the GM designation, the largest building in 1990 was 18,166 square feet and the maximum building size was set at 20,000 square feet.[171] In the RIM designation, the largest building in 1990 was 22,040 square feet and the maximum building size was set at 22,000 square feet.[172] In the RGC designation, the largest building in 1990 was 11,134 square feet and the maximum building size was 12,000 square feet, except for grocery stores have a maximum of 35,000 square feet.[173] In the STC designation, the largest building in 1990 was 18,221 square feet and the maximum building size was set at 12,000 square feet. [174] Finally, in the NC designation, the largest building in 1990 was 5,120 square feet and the maximum building size was set at 6,000 square feet.[175]

Petitioner's proffered evidence shifted the burden to the County to come forward with facts in rebuttal, which the County failed to do.

[169] I*d.*, Compliance Order, p. 11.
[170] Ex. R-006 (Building Size Data).
[171] Ex. D-003, Exhibit B, p. 37 (WCC 20.67.301).
[172] *Id.*, p. 45 (WCC 20.69.301).
[173] Ex. D-003, Exhibit B, p. 23 (WCC 20.59.321-.322).
[174] *Id.*, p. 30 (WCC 20.61.321).
[175] *Id.*, p. 25-26 (WCC 20.60.301).

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The Petitioners also object to the maximum building size in Rural Business LAMIRDs as they allege it does not ensure a small-scale use. The County responds that while existing development within such a designation does not have to be small-scale, the statute clearly limits new development to cottage industries and small-scale businesses. RCW 36.70A.070(5)(d)(iii). The County maintains the statute allows *both* cottage industries and small-scale businesses.

The Board finds that the Petitioners have demonstrated that the County's approach to the regulation of LAMIRDs in its zoning code is clearly erroneous. The GMA provides that the rural element of a comprehensive plan may provide for limited areas of more intensive rural development (LAMIRDs). It provides for three types of LAMIRDs:

> (i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments (Type I LAMIRDs);
> (ii) (ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development (Type II LAMIRDs); and
> (iii) (iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents (Type III LAMIRDs).[176]

In this case, the Board reviewed the County's method to accommodate LAMIRDS, and the allowable uses within the LAMIRDS, in rural areas. The Board found the method to be laborious and convoluted. The process in the proposed regulations goes as follows.

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[176] RCW 36.70A.070(5)(d)(i), (ii) and (iii).

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The County established three types of LAMIRDS in its Comprehensive Plan. Type I LAMIRDs are Rural Community; Type II LAMIRDs are Rural Tourism; Type III LAMIRDs are Rural Business. Further, the County stated "[t]he purpose of LAMIRDs is to place limits on more intensive development and prevent it from adversely affecting the character of the surrounding rural area.[177]

The County then created a series of "Districts" in which it defines uses allowed within the three LAMIRDs. A LAMIRD was allowed to contain more than one district. This construct is not easy to follow, as the user must switch between the Revised Code of Washington, the County Comprehensive Plan and the County development regulations. The Board analyzed the allowable uses within LAMIRDs to determine compliance with the GMA and had several concerns:

WCC 20.32 Residential Rural may be designated in Rural or Rural Communities (LAMIRD Type I) and the uses in it are in compliance with GMA. However, this District also allows a Rural Density Overlay. This overlay allows subdivision of property to maximum of 1 du/acre and allows twice the impervious surface as under the former regulations; this is accomplished by including the RR-5A zone in this district which allows 20% impervious surface, not 10%.[178]

WCC 20.36 Rural District does not specify a LAMIRD Type in which it can be located. By definition it remains "rural", however, this district also allows a density overlay in subsection 20.36.252.

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[177] Exhibit A: County Comprehensive Plan (proposed amendments) at 11

[178] The Board questions how the density overlay will maintain the 1990 existing character as required in a Type I LAMIRD and how the increased impervious surface will affect surrounding critical areas or infrastructure to handle stormwater.

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WCC 20.59 Rural General Commercial district is allowed in Rural Community (LAMIRD Type I) or Rural Business (LAMIRD Type III). Thus, permitted uses in WCC 20.59.050 must be found in existence in 1990 or be small scale business, cottage industries or isolated. Upon review of these permitted uses, the Board questions whether intermediate passenger intermodal terminals were present in 1990 (see WCC 20.59.057) or whether secure community transition facilities for sex offenders were present in 1990.[179]

WCC 20.60 Neighborhood Commercial Center is allowed "outside a UGA…and shall comply with the rural land use policies and criteria as set forth in the Comprehensive Plan."[180] In WCC 20.60.706, the County requires proposed new uses in a Neighborhood Commercial district located in a Rural Community (LAMIRD Type I) to be consistent with size, scale, use or intensity of 1990. The Board finds that this complies with the GMA, but the user of Comprehensive Plan and development regulations must know to refer to the definition section of this code (WCC 20.97.121 Existing Uses) to know that NC Centers must conform to 1990 uses.[181]

WCC 20.61 Small Town Commercial District is allowed in both Rural Community (LAMIRD Type I) and in Rural Business (LAMIRD Type III). Again, the question arises: are the permitted and conditional uses allowed in this district limited to 1990 standards or small-scale, isolated or cottage industries?

WCC 20.63 and WCC 20.64 Tourist Commercial District and Resort Commercial Districts are located in a Rural Community (LAMIRD Type I) and are consistent with 1990 standards.

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[179] It is not clear that all permitted and conditional uses were in existence in 1990 or are small-scale, cottage industries and isolated. These uses appear to be copied from an urban area and allowed in a rural area.
[180] WCC 26.010 Purpose of Neighborhood Commercial Center from Exhibit B: County Development Regulations at 25 f
[181] The County may wish to make the 1990 standard more evident by directly listing it in the development regulation "purpose" section.

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WCC 20.67 General Manufacturing District was formerly confined to urban areas. With the new development regulations, this district is now described as "…those of heavy industry, but of greater intensity than uses associated with the Rural Industrial-Manufacturing district…" and when located in a rural area are subject to the new rural land use policies.[182] Further, the new development regulations allow General Manufacturing districts to locate in Rural Communities (LAMIRD Type I). The building sizes are allowed up to 35,000 square feet as long as those sizes are from "currently zoned GM and designated Rural Community". At the Hearing on the Merits, the Board questioned the County about how development regulations would be implemented. The response was that if a landowner could find a Rural Community Type I LAMIRD *anywhere* in the County and it contained a building with 35,000 square feet, then that standard could be imported to another Rural Community LAMIRD with the General Commercial district – regardless of the 1990 standard in that LAMIRD. The Board finds this scheme circumvents and violates both the spirit and letter of the Growth Management Act. In addition, this development regulation does not contain limits or conditions on lot coverage for General Commercial Districts; see WCC 20.67.450. This leaves the interpretation up to the county permit staff to determine lot coverage rather than clearly stating the requirements for landowners and the public.

WCC 20.69 Rural Industrial-Manufacturing (RIM) District may be allowed in both Rural Community (LAMIRD Type I) and Rural Business (LAMIRD Type III) and the purpose is to prefer facilities for producing agricultural, forest and aquatic products. Permitted uses include those related to agriculture, forestry and aquatic resources, but they also include an additional five pages of uses or conditional uses that allow a variety of uses found in urban areas: processing and packaging of pharmaceuticals, sporting goods, engineering, medical products; rail, truck and freight terminals; manufacturing or fabrication of metal products and

[182] WCC 20.67.010 General Manufacturing District from Exh. B County Development Regulations (proposed amendments) at 35

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machinery, rubber and plastic products. Through administrative or conditional uses this district may also contain temporary storage for manufactured homes or junk yards or passenger intermodal terminals or solid waste handling facilities. Adult businesses are the only use prohibited in this district. The Board observes that these uses are not consistent with the County's Comprehensive Plan which proclaims the rural character is "a "mixture of historic rural communities, pasture, agriculture, woodlots, home occupations" nor are these uses consistent with the County's policy to "protect the character …in terms of natural landscape as well as rural lifestyle".[183] In addition, as with the General Commercial district, the RIM District regulations do not contain limits or conditions on lot coverage; see WCC 20.69.450. This leaves the interpretation up to the County permit staff to determine lot coverage rather than clearly stating the requirements for landowners and the public.

Therefore, when the Board reviewed how the LAMIRDS were defined and the uses allowed in them it found contradictions and violations of the GMA. For example, as for Type I LAMIRDs, the GMA provides: "Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas."[184] An "existing area" or "existing use" is one that was in existence on July 1, 1990.[185] The fundamental problem of the County's approach is that its development regulations fail to limit LAMIRDs in the manner required by the GMA. Rather than determining the size, scale, use and intensity of uses that *existed in a particular area* to be designated as a LAMIRD, and limiting future development in the LAMIRD on that basis, the County instead allows uses in a particular LAMIRD based on the zoning designation applied to a LAMIRD, regardless of whether those uses were present in that LAMIRD on July 1, 1990.

The County further makes no attempt in its development regulations to limit the size or scale of new development to be consistent with the character of the existing area, circa 1990 for

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[183] Exhibit A: County Comprehensive Plan, Rural Character and Lifestyle; Goal 2DD-2
[184] RCW 36.70A.070(5)(d)(i)(C)
[185] RCW 36.70A.070(5)(d)(v)(A).

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Type I LAMIRDs nor does it limit intensification of uses in Type III LAMIRDs to isolated non-residential uses, isolated cottage industries or isolated small-scale businesses. By way of illustration, as mentioned above, the maximum building size for uses in a LAMIRD covered by a Rural General Commercial District (RGC) zoning designation are controlled by WCC 20.59.321 which provides:

> .321 Except as otherwise specifically allowed in 20.59.322, in a Rural Community designation, the allowable building floor area shall not exceed 12,000 square feet, or a larger size if consistent with the size, scale, use or intensity of similar uses that existed on July 1, 1990 within the areas currently zoned RGC and designated as a Rural Community, except as otherwise specifically allowed in this chapter. Determination on consistency with 1990 uses shall be made by the planning and development services department and may be appealed per the process described in Section 20.84.240.

Thus, the County development regulations allow the establishment of a new 35,000 sq. ft. grocery store as an allowed use regardless of whether that particular LAMIRD contained a grocery store or a 35,000 sq. ft. grocery store in 1990. Instead, the County bases the size restriction on whether such a use existed on July 1, 1990, within any area currently zoned RGC. By further illustration, the 20,000 sq. ft. floor area limit in WCC 20.67.301 for the General Manufacturing District (GM) appears to bear no relation to any 20,000 sq. ft. use in the LAMIRD in 1990. [186] Instead, the inquiry, under WCC 20.67.301 is whether the scale of use, on July 1, 1990, existed within the areas currently zoned GM and designated as a Rural Community.

By failing to adopt appropriate limits on development based on the size, scale, use or intensity of 1990 development in the areas now designated as Type I LAMIRDs, the County fails to limit LAMIRDs "consistent with the character of the existing areas" as mandated by the GMA. Instead, the County would allow the character of its designated LAMIRDs to be

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[186] Ex. R-006

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radically changed. This does not comply with LAMIRDs' consistency requirement and fails to comply with the GMA.

As the Supreme Court reminded the Board and Whatcom County in its *Gold Star* remand:[187]

> LAMIRDs are not intended for continued use as a planning device, rather, they are "intended to be a one-time recognition of existing areas and uses and are not intended to be used continuously to meets needs (real or perceived) for additional commercial and industrial lands.

Conclusion: The Board concludes that that Petitioners have demonstrated that the County committed clear error in adopting development regulations for its LAMIRDs that violate RCW 36.70A.050(d)(i-iii).

Challenged LAMIRDs, Water Lines, Adjacent to UGA and LOBs

Turning to the Logical Outer Boundaries (LOBs) of individual LAMIRDs under challenge, the Board will consider each in turn. The challenges to the zoning and allowed uses within the challenged LAMIRDs is addressed elsewhere in this Order.

Before focusing on the challenged LAMIRDs, the Board must first address two broader issues that will guide the Board's treatment of these LAMIRDs – the question whether the existence of water lines, circa 1990, is sufficient evidence of the 1990 built environment, and the question whether it is appropriate to establish LAMIRDs adjacent to UGAs.

Water Lines as Evidence of the 1990 Environment

The Legislature in designing the requirements for the Rural Element provided that a county may recognize (pre-GMA) existing areas of more intensive rural uses. The presence of a water or sewer line on a property, without more, is not evidence of intensive rural uses. A pre-1990 utility pipe may be considered as part of the built environment in determining a

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[187] 162 Wn.2d at 727

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logical outer boundary for a LAMIRD,[188] but there must be some evidence of more intensive rural uses to justify LAMIRD designation in the first place. To the extent the Board's decision in *1000 Friends of Washington v Thurston County*, [189]appears to allow LAMIRD designation based on water lines alone, that decision is distinguishable.

First, water and sewer lines are extended through non-urban areas for various reasons,[190] perhaps to bring water supply from a mountain reservoir to the city or to convey wastewater from a designated UGA to treatment facilities in another UGA.[191] The mere presence of the underground pipe cannot always be construed to indicate "more intensive rural uses" as required for LAMIRD designation. Further, a reading of the statute that permitted intensive rural development along any pre-1990 utility pipelines would result in precisely the strip development the GMA was designed to counter.

Second, the Board is further persuaded by the reasoning of the Supreme Court in *Kittitas County*[192] concerning the County's responsibility to *"assure that land use is not inconsistent with available water resources."* Regardless of the existence and size of water or sewer pipes in a particular location, the County's land use provisions should not force water and sewer purveyors toward actions that undermine the obligation to protect water quality and quantity.

Third, Whatcom County's County-Wide Planning Policies specifically provide:[193]

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[188] WAC 365-196-425(6)(c)(i)(C)(II), allowing consideration of built environment above and below ground).
[189] WWGMHB 05-2-0002, Compliance Order (Nov. 30, 2007).
[190] See WAC 365-196-425(4)(b).
[191] *Gain v. Pierce County*, CPSGMHB 99-3-0019, Final Decision and Order (Apr. 18, 2000), at 5; see *Fallgatter v City of Sultan*, CPSGMHB Case Nos. 06-3-0003, 06-3-0034, 07-3-0017, Order Finding Compliance (Nov. 10, 2008), at 11 (The Board has previously found that sewer lines extending beyond the UGA into rural areas to re-connect with the UGA or another UGA is not prohibited under the GMA, so long as the connections to such a line in the rural area are prohibited [and noting connections outside the UGA are prohibited by both Sultan and Snohomish County]).
[192] 172 Wn.2d at 178.
[193] CWPP F(7)

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> The availability of pipeline capacity required to meet local needs and/or supply shall not be used to justify development counter to the county-wide land development pattern and *shall not be considered in conversions of* agricultural land, forestry, and *rural areas*.

While this policy on its terms applies primarily to UGA expansions, it establishes the principle that pipelines and pipeline capacity "shall not be considered" in deciding whether to intensify rural areas.

LAMIRDs Adjacent to UGAs

While the Board acknowledges that nothing in RCW 36.70A.070(5)(d) explicitly precludes the designation of a LAMIRD adjacent to a UGA, this section cannot be read in isolation. RCW 36.70A.110(4) provides that "in general cities are the units of local government most appropriate to provide urban governmental services". RCW 36.70A.110(3) provides that urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development. While it is acknowledged a LAMIRD is by definition a rural designation, the GMA allows development in LAMIRDs at an intensity atypical of most forms of rural development and allows, within LAMIRDs, "necessary public facilities and public services to serve the limited area".[194] Establishment of a LAMIRD immediately adjacent to a UGA prevents a more efficient expansion of the UGA to areas that can be readily developed at urban densities. Instead, such LAMIRDs are contrary to the County's Policy 2DD-1 which provides "Concentrate the majority of growth in urban areas and recognize rural lands are an important transition area between urban areas and resource areas."

[194] RCW 36.70A.050(5)(d).

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As the Board held in *Anacortes v. Skagit County*, "designation of a C/I LAMIRD adjacent to Anacortes's UGA without evaluation of suitability of allowed urban style development, need for urban services, or inclusion in Anacortes's UGA, fails to comply with the Act."[195]

Birch Bay, Lynden and Valley View

Summary Description: The proposed LAMIRD designation includes three parcels. A small recreational vehicle park was developed on the two northernmost parcels in the late 1980's. The commercial building and in-ground water hookups for the commercial use existed in 1990. The same property had previously been used as a drive-in theater. The third and smallest parcel is at the intersection of Birch Bay-Lynden & Valley View Roads and is included within the LAMIRD boundary in order to follow the physical features of the two roads and avoid an irregular outer boundary.[196]

Hirst alleges this LAMIRD contained a small recreational vehicle park in 1990 yet the LAMIRD now includes a parcel that was undeveloped in 1990, creating a pattern of sprawl in violation of RCW 36.70A.070(5)(d)(iv). Hirst argues that rather than limiting development to those consistent with the building size, scale, use or intensity existing as of July 1990, the County has designated the property Rural General Commercial (RGC), thus allowing a broader array of uses.[197]

Futurewise argues that this LAMIRD is oversized and extends well past the 1990 built environment. It asserts that while this area had commercial or industrial development in

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[195] WWGMHB No. 00-2-0049c, FDO at 26 (2/6/01). All three Board regions are in accord. *Tacoma v Pierce County*, CPSGMHB Case No. 99-3-0023c, FDO (June 26, 2000); *Citizens for Good Government v Walla Walla County*, EWGMHB 01-1-0015c and 01-1-0014c, FDO (May 1, 2002); *Better Brinnon Coalition v. Jefferson County*, WWGMHB Case No. 03-2-0007, Compliance Order (June 23, 2004).

[196] Ex. R-001 at 10.

[197] The Board addressed the size, scale, use and intensity allowed in the RGC designation in Section E – LAMIRD Criteria, concluding the allowed uses are not consistent with the GMA LAMIRD requirements.

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1990, there was limited development on the east side of two of the three lots with most of the work being merely clearing and grading.[198]

As to this, and in fact all the challenged LAMIRDs, the County asserts that in mapping these LAMIRDs it complied with the requirements of RCW 36.70A.070(5)(d), and in particular sections (iv) and (v) which provide:

> (iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary, the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries, such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;
>
> (v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:
>
> (A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

The County states that the findings and conclusions in the ordinance lay out how and why the County made its decisions both in general and specific areas.[199]

With regard to the Birch Bay Lynden & Valley View LAMIRD the County refers to the information provided in the LAMIRD Report, where the Council concluded:

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[198] Futurewise Objections at 18.
[199] County Response to Objections at 18.

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> Establishing the designation boundary to include the parcels characterized by the built environment in 1990 the parcel south follows physical features (Birch Bay-Lynden Road and Valley View Road), and avoids an abnormally irregular boundary.[200]

The County alleges that neither Petitioners nor Participants acknowledge the extent of the built environment that existed on the property in 1990. In support of the fact that such built environment existed the County points to a letter submitted to the Council by the attorney for the property owner stating:

> There are three conditions which establish the built environment for Gold Star's land. The first is the recreational vehicle park located in Section 23 on Parcel Nos. 400123 036106 0000 and 400123 04065 0000, which existed on July 1, 1990. The Park included both above and below ground improvements insisting of thirty-five (35) individual water and electrical hookups, a coin-operated laundry facility, concession stand, a convenience retail store, washrooms, a caretaker's residence, and an office/sales office in a 2800 ft.^{2} commercial building built on the site. This Park was a permitted use under the Gateway Industrial district established by WCC20.65.056(5).[201]

The County notes that it scaled back the property owner's request and included only the parcels with the built environment in this LAMIRD and one additional two-acre parcel in separate ownership on the corner of Birch Bay – Lynden and Valley View Roads to follow physical features.

The Board agrees with the County that the parcels that contained a commercial use in the 1980's and 1990's meet the GMA standards for inclusion in a LAMIRD. However, the third included parcel, by common agreement, was not characterized by the built environment in 1990. Considering the configuration of the lots, extension of the LOB to include this property is not necessary to avoid an irregular outer boundary.

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[200] IR D-003, p.16
[201] County Response to Objections at 19, citing IR C-109.

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Conclusion: The LOB established for the Birch Bay Lynden Valley View LAMIRD complies with the GMA with the exception of the included third parcel that was not characterized by the built environment and the inclusion of which is not necessary to avoid an irregular boundary.

Eliza Island

Summary Description: The Eliza Island affected area is an island containing 185 acres zoned EI with residential and community uses. The majority of the island was subdivided decades ago and was characterized by considerable buildout in 1990 and since. The shoreline of the island creates a physical boundary for the LAMIRD.[202]

Futurewise argues that, while the average parcel size on Eliza Island was 2.3 acres in 1990, by 2008 it was 1.3 acres. The EI zone allows for the creation of new half-acre building lots. This, Futurewise asserts, is contrary to the requirement that uses in Type I LAMIRDs must be consistent with the use, scale, size and intensity of the uses that existed as of July 1, 1990.

In response to Futurewise's challenge to this LAMIRD, the County notes that the Council made the following conclusion:

> While the majority of the platted lots had yet to be developed individually in 1990, roads and utilities had been installed within the subdivision. Establishing the designation boundary to include the entire subdivision preserves the character of the existing natural harbor and follows a physical boundary (Bellingham Bay shoreline).[203]

Further, the County argues that Futurewise offers confusing lot size information since the area has many small subdivided lots and a large unsubdividable common area. It notes there is no potential for additional lots.[204]

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[202] Ex. R-001 at 10.
[203] County Response to Objections at 20.
[204] County Response Brief at 86.

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The County's LAMIRD report notes that "The majority of the island was subdivided decades ago and was characterized by considerable buildout in 1990 **and since**." [205](emphasis added). The fact that the island was subdivided is irrelevant in a determination of the 1990 "built environment". Likewise irrelevant is the extent of any buildout on the Eliza Island post-1990 – the relevant inquiry is the extent of the built environment on July 1, 1990.[206] Furthermore, the mere presence of roads in this area does not demonstrate that this was an area of more intensive rural development as the presence of roads is not inconsistent with less intensive rural development patterns. The Board finds that the record does not support the County's conclusion that Eliza Island was characterized by the built environment, and designating this area as a LAMIRD was clearly erroneous.

Conclusion: Petitioner has carried its burden of proof to demonstrate that designation of Eliza Island as a LAMIRD was clearly erroneous.

Fort Bellingham/Marietta and North Bellingham

Summary Description: The Fort Bellingham/Marietta affected area consists of about 811 acres zoned R-2A and RR-1 with nonconforming commercial uses (neighborhood store and commercial greenhouse), and no nonresidential zoning. The affected area is adjacent to the west limit of Bellingham's UGA. During the recent review of Whatcom County's UGA's the area was not proposed for inclusion in the Bellingham UGA.

The southern and western portion of the affected area is zoned RR-1 and is characterized by more intensive development, including a neighborhood store and a large greenhouse nursery business, and residential development with an average lot size of just over one acre. This southern/western area is proposed for a LAMIRD with its eastern border being

[205] Ex. R-001.
[206] RCW 36.70A.070(d)(v)(A).

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the Bellingham UGA, the southern boundary being the Bellingham Bay shoreline, and the western boundary being roughly the Nooksack River/Silver Creek floodway. The northern LAMIRD boundary follows the division between the smaller lots to the south and larger lots to the north, roughly following the current Suburban Enclave/Rural designation boundary. The portion of the affected area north of the proposed LAMIRD is characterized by mixed lot sizes ranging from 0.3 acres to 19.9 acres, with an average lot size of 3.4 acres, and is proposed for RR-5A and R-5A zoning with a Residential Rural Density Overlay. The area west of the proposed LAMIRD boundary lies within the 100 year floodway and is proposed for rezoning to RR-5A with no density overlay.[207]

Summary Description: The North Bellingham affected area is located on the southeast limit of Ferndale's urban growth area. The area was not proposed for inclusion in the Ferndale UGA during Whatcom County's 2009 UGA review. Development in this area dates back to the early 20th century and includes some nonconforming local businesses as well as a fire station and a school. The affected area consists of about 971 acres zoned UR-4 and RR-1. The City of Ferndale extended water and sewer service into the area decades ago but is currently not planning to allow additional connections.

Much of the affected area was developed at residential densities of one dwelling per acre or greater in 1990. The proposed LAMIRD boundary follows the outer edge of the majority of this area to include all the natural neighborhood as it existed in 1990 and to avoid creating an abnormally irregular boundary. The southernmost portion of the affected area was not developed to the same extent in 1990 – its parcels range in size from 0.2 acres to 9.1 acres and the average lot size is 1.8 acres – and it is proposed for RR-5A zoning with a Residential Rural Density Overlay.[208]

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[207] Ex. R-001 at 24.
[208] Ex. R-002 at 42.

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Hirst argues that the County has designated these LAMIRDs adjacent to UGAs and that this violates the requirement to ensure that LAMIRD's will not interfere with the ability to provide public facilities and public services in a manner that does not permit low-density sprawl. Hirst notes that these LAMIRDs incorporate large areas of land that was undeveloped in 1990; that only 55% of the Fort Bellingham LAMIRD was developed in 1990; and that only 55.5% of North Bellingham was developed. Hirst argues that it is inappropriate to establish LAMIRD adjacent to UGAs because this encourages residential development to be located outside UGAs, fails to contain more intense urban growth, and exacerbates the problem of competition with urban areas.

Futurewise notes that the Fort Bellingham LAMIRD is located adjacent to the Bellingham UGA on the east. This poses the problem that the small lots in the UGA lock in the UGA and prevent a more efficient expansion of the UGA into areas that can be readily developed at urban densities.[209] Futurewise also argues that the water system in a LAMIRD should have grid and loop patterns with water lines of at least eight inches in diameter, such as are found in an urban area, yet this area has very large loops and many water lines of four and six inches in diameter. From this Futurewise concludes that this is a rural water system, not one that can support the designation of a LAMIRD.[210]

The City also challenges the Fort Bellingham and North Bellingham LAMIRDs, arguing that such designation adjacent to the UGA precludes logical urban expansion over time.

The County notes that both Fort Bellingham/Marietta and North Bellingham areas are adjacent to UGAs, the former being adjacent to the Bellingham UGA and the North Bellingham area being adjacent to the Ferndale UGA.[211] The County notes that both Futurewise and participants object to the areas in part because they are adjacent to UGAs,

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[209] Futurewise Objections at 20.
[210] Futurewise Objections at 21.
[211] County Response to Objections at 21.

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but points out that the GMA does not explicitly prohibit such adjacency although this Board has in the past raised concerns over the inappropriate conversion of undeveloped land into sprawling low density development. The County argues that this concern has predominantly arisen in the context of industrial and commercial LAMIRDs. The County suggests that these concerns do not pertain here, where the pattern of rural residential development was established prior to July 1, 1990 at which time 67.5% of the parcels zoned RR-1 in Fort Bellingham/Marietta were developed with an average parcel size of 1.1 acres, and 65.6% of the parcels zoned RR-1 in North Bellingham were developed with an average parcel size of 0.8 acres.[212] By 2008 82.4% of the parcels in Fort Bellingham/Marietta were developed.[213] Because the residential patterns in these areas have been established for many years, removing these areas from LAMIRDs will not allow for a more efficient expansion of UGAs, the County argues. Instead, it maintains that these LAMIRDs were established based on a Logical Outer Boundary (LOB) consistent with the requirements of RCW 36.70A.070(5)(d)(iv).

As the Board noted above, though the GMA does not explicitly prohibit the establishment of a LAMIRD adjacent to a UGA, such placement is contrary to other provisions of the Act. See, the Board's discussion of this topic, above. For the foregoing reasons, the Board finds the establishment of a LAMIRD adjacent to a UGA to be clearly erroneous.

Conclusion: The Board concludes that the creation of the Fort Bellingham/Marietta and North Bellingham LAMIRDs adjacent to a UGA was clearly erroneous.

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[212] County Response to Objections at 23.

[213] Petitioners point out that these statistics are skewed because the areas in question contain subdivisions of many small parcels but also large undivided parcels. A more telling statistic would compare percentages of the total area subdivided in 1990 and today.

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Kendall

Summary Description: The Kendall area includes approximately 59 acres located at the intersection of the Mt. Baker Highway (SR 542) and Kendall Road, and until 2009 was located within the Columbia Valley UGA.

The area zoned STC was characterized by the built environment on July 1, 1990, with uses including public community services, restaurant, retail, and service stations. In 1990, lots within the proposed Rural Community boundary totaling just under six acres had public or commercial uses, and those totaling about 14 acres had residential uses. The general area is bounded on the west by the elementary school and the curve of Kendall Road, and on the east by a private road that serves multiple residences outside the LAMIRD, and where a power substation is located. The proposed LAMIRD boundary follows the STC-zoned parcels in between those features. The LAMIRD boundary includes undeveloped parcels located between those that had been developed in 1990, part of the natural neighborhood of the Kendall area, and included to avoid an abnormally irregular boundary. The school is not located in a zoning district or comprehensive plan designation that was affected by the hearings board decision but it is recommended for inclusion within the LAMIRD as an important public facility that serves the area.[214]

Futurewise points out that this LAMIRD includes a large area of undeveloped land, and only 33% of the LAMIRD was developed. Thus, it concludes that the logical outer boundary does not comply with GMA requirements.

The County noted that, in support of its decision, the County Council made the following conclusion:

> Establishing the designation boundary to include the area characterized by a more intensive development in 1990 follows physical features (the elementary school, the curve in Kendall Road, and a private road to the

[214] Ex. R-001 at 30.

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east), preserves the character of the existing natural neighborhood and avoids an abnormally irregular boundary.

The County points out that this area includes a 22-acre parcel that contains the Kendall Elementary School and that this school is properly included within the LAMIRD as a public facility that serves the area. [215] It notes that while Futurewise states that in 1990 only 33% of the LAMIRD was developed this figure included the 22 acres of undeveloped school property. In its Reply Brief, Futurewise indicated that if the County can show that the undeveloped land east of the Mount Baker Highway is part of the school site it would withdraw its appeal of the Kendall LAMIRD.[216] The Board finds that the County in fact made this showing, and concludes that the Kendall LAMIRD was properly designated.

Conclusion: The Board concludes that the County's designation and LOB of the Kendall LAMIRD was not clearly erroneous.

Point Roberts

Summary Description: This Rural Community contains all of Point Roberts, which is bounded by water on three sides and the Canadian border on the north. Point Roberts would retain the existing zoning, with the exception of the Light Impact Industrial and General Commercial zones which are proposed to be changed to RIM and RGC zoning designations, respectively. Uses in Point Roberts include residences, public community services, restaurant & bar, grocery, service station, retail sales, resort and tourist accommodations and recreation, art gallery, professional services, manufacturing, and other commercial operations.

The 1990 built environment predominates within the more intensive areas of Point Roberts; the areas with rural and open space zoning would maintain their less intensive development

[215] County Response to Objections at 24.
[216] Futurewise Reply at 52.

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patterns through implementation of Comprehensive Plan and subarea plan policies and zoning regulations.[217]

Futurewise objects to this LAMIRD on the basis that it contains extensive areas of undeveloped land, yet in 1990 only 21% of the LAMIRD was developed.[218] In addition, it argues that the uses allowed in the Point Roberts Transitional Zone District are not limited to those uses that existed in 1990, and that there are no standards limiting intensity and building sizes to those that existed in 1990.

The County notes that in support of its decision, the County Council made the following conclusion related to Point Roberts:

> While the majority of the parcels had yet to be developed individually in 1990, roads and utilities had been installed throughout the area. Establishing the designation boundary to include the entire peninsula preserves the character of the existing natural neighborhood and follows a physical boundary (the international boundary and the Boundary Bay shoreline).

The County notes that Policy 2 JJ – 5 was specifically included to address the difficult pattern of development in a unique area such as Point Roberts. That policy provides:

> Lands inside Rural Community designation boundaries that are within low density residential zones (one residence per 5 acres or less density) or resource zones, or are federally owned, should not be rezoned to allow more intensive uses and densities.

Thus, pursuant to this policy, the 776.7 acres of R5A land in Point Roberts remained as R5A and the Recreation and Open Space (ROS) land remained as ROS.

While the Board does not accept the subdivision of land and the mere presence of roads as sufficient evidence of the 1990 built environment, the County LAMIRD Report documented that in 1990 the built environment predominated in this area. Use of the Canadian border to

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[217] Ex. R-001 at 46.
[218] Futurewise Objections at 22.

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the north, and the water on the remaining sides of this peninsula appeal to be a logical LOB. Furthermore, the Board agrees with the County that its Policy 2JJ-5 adequately preserves the 776.7 acres of R5A and prevents more intensive uses and intensities.

Conclusion: The Board concludes that the County's designation and LOB of the Point Roberts LAMIRD was not clearly erroneous.

Nugents Corner

Summary Description: The Nugents Corner affected area is a small node of commercial and residential uses at the intersection of Mt. Baker Highway (SR 542) and Highway 9. Nugents Corner is a service hub for the rural residents in the surrounding area, and includes a grocery store, tavern, service station, title company, bank, and other service and community-oriented uses.[219]

Hirst alleges that the extent of the 1990 built environment on one of the Nugent's Corner parcels was a single family residence, yet with the current Small Town Commercial (STC) zoning it is permissible to construct buildings 12,000 square feet or larger for non-residential uses.

The County notes that in support of its decision the Council made the following conclusion:

> Establishing the designation boundary to include the parcels characterized by more intensive development in 1990 preserves the character of the existing natural neighborhood and avoids an abnormally irregular boundary.

The County points out that participants challenge this LAMIRD on the basis that its boundary includes a 3.73 acre parcel with a house on it. In response the County states that this parcel is bordered by businesses along the Mount Baker highway on one side and shares a well with those businesses.

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[219] Ex. R-001 at 44.

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The Board finds that the all of the lots contained within the Nugents Corner LOB were developed in 1990. Inclusion of the 3.73 acre parcel that in 1990 contained a single family residence was not clearly erroneous. While the Board addressed the size, scale use and intensity allowed within LAMIRDs elsewhere in this Order, we find that the Nugents Corner LOB is properly established consistent with the 1990 built environment.

Conclusion: The Board concludes that the County's designation of the Nugents Corner LOB was not clearly erroneous.

Smith and Guide Meridian

Summary Description: The Smith Road & Guide Meridian affected area is currently designated in the Comprehensive Plan as a Transportation Corridor along both sides of Guide Meridian (SR 539), though some affected zoning extends into the Rural designation behind the corridor. The designation includes commercial and industrial zones, as well as Rural zones. The area contains a variety of industrial and service-oriented uses that provide job opportunities and serve the needs of surrounding rural residents and the traveling public, including auto repair and sales, restaurant & bar, service station, furniture sales and repair, pipe storage and sales, and other more intensive uses. The areas within the Transportation Corridor zoned for rural uses north of Axton and south of Smith contain residential and agricultural uses as well as scattered nonconforming businesses.

Nodes of commercial and industrial development had been established on Guide Meridian at the Smith Road and the Axton Road intersections in 1990, with scattered commercial and residential development in between. More than half the parcels within the proposed LAMIRD boundary had been developed by 1990. An 8-inch diameter water line was in place along Guide Meridian in 1990 north of Smith Road and a 10-inch line existed south of Smith – sizes capable of serving more intensive development. Those lines were replaced by 12-inch and 16-inch lines respectively during the 2007-09 SR 539 widening project. The

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proposed LAMIRD boundary includes the portions of the area zoned for commercial and industrial uses and served by the large diameter water line. The proposed LAMIRD boundary follows the existing boundary (even in the case of split-zoned lots which extend farther from Guide Meridian than the zoning boundary) in order to avoid an abnormally irregular boundary and to prevent the expansion of the more intensive uses away from Guide Meridian. The current GC and LII zones would be replaced by the RGC and RIM zones, respectively, which are consistent with the 1990 size, scale, use, and intensity of 1990 commercial and industrial uses in the rural area. Lots south of Smith Road and north of Axton Road currently within the Transportation Corridor designation but zoned for rural uses would have a Rural designation and retain their rural zoning.[220]

Hirst alleges that this 233 acre LAMIRD incorporates large areas that were either undeveloped or developed at low densities in 1990, and thus the County has not established an appropriate LOB. Hirst also argues that the County's use of Rural General Commercial (RGC) zoning allows the entire LAMIRD to be developed under RGC and Rural Industrial Manufacturing (RIM) zoning, thus allowing uses inconsistent with the 1990 built environment.

Participants also argue that adding 150 acres of industrial and commercial land just outside the Bellingham UGA creates a new pattern of sprawl in violation of RCW 36.70A.070(5A)(d)(iv).[221]

The City objects to the Smith Guide Meridian LAMIRD as contributing to a strip of commercial sprawl north of the UGA to the Canadian border. The City contends the County's reliance on a water main to define the built environment and set a LOB is based on false assumptions about water service availability.

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[220] Ex. R-001 at 52.
[221] Participants' Objections at 17.

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The County notes that in support of its decision the Council made the following conclusion:

> Establishing the designation boundary to include the parcels and portions of parcels characterized by more intensive development in 1990 preserves the character of the existing natural neighborhood, avoids an abnormally irregular boundary, and is consistent with the efficient provision of water service as via the large diameter water line that existed along Guide Meridian in 1990.

In addition the Council made the following finding:

> According to Deer Creek Water Association records, a 10 inch diameter water line existed on July 1, 1990 in Guide Meridian (SR 539) between the Bellingham UGA and Smith Road, and an 8 inch water line existed in Guide Meridian between Smith Road and a point about 1,800 feet north of Laurel Road. The lines were replaced during the 2007 – 2009 Guide Meridian widening project with a 16 inch line between the Bellingham UGA and Smith, and a 12 inch line between Smith and Laurel Roads.

The County concludes that the decision to include the additional acreage was based on the existence of this waterline and the fact that in 1990 the area as a whole was characterized by a pattern of interspersed more intensive uses.

The Board finds that in examining the extent of the 1990 built environment, there was little evidence of significant development between the nodes of commercial and industrial development at the Smith Road and Axton Road intersections. The County LAMIRD report instead appears to have relied heavily on the presence of water lines along Guide Meridian "capable of serving more intensive development".[222] There is no evidence of water lines east of Guide Meridian, yet the LAMIRD includes this area.

Conclusion: The Board concludes that it was clear error for the County to include within the Smith & Guide Meridian LAMIRD LOB those areas between the nodes of 1990 development at Smith and Axton Roads that was not characterized by the built environment in 1990.

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[222] R-001 at p. 52.

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Van Wyck

Summary Description: Van Wyck is a small node of businesses and residences at the intersection of SR 542, Noon Road, and Van Wyck Road. The current NC zoning boundary comprises about 7 acres and includes the businesses as well as all or part of residential parcels.

This proposed Rural Community designation contains 5 parcels located on State Route 542 (Mt. Baker Highway) totaling approximately 3 acres. The Rural Community area includes parcels that contained more intensive uses than the surrounding rural area as of July 1, 1990, including a rural country store, furniture business, an antiques business, and heating and cooling systems sales, service and repair. The outer boundary captures these two commercial uses on the south side of SR 542 and the residential use between them. The boundary also includes the two parcels on the north side of SR 542 between Van Wyck Road (one commercial use and one residential) and two parcels west of Noon Road (an antique store, which was an existing residential use on a small lot in 1990, and a vacant parcel which has water meters connected to a water line installed prior to 1990 and whose inclusion avoids an abnormally irregular outer boundary). The residential parcels outside the Rural Community boundary are proposed for R-5A zoning.[223]

Hirst argues that the Van Wyck LAMIRD includes a field that was vacant in 1990 and remains vacant today. It notes that the County relies upon the presence of a water meter connected to a water line as evidence of more intense development in 1990. It argues that the County has not established a logical outer boundary and the proposed development of the site is not consistent with the character of the existing area in terms of building size, scale, use, or intensity.

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[223] Ex. R-001 at 56.

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Participants argue that the Van Wyck LAMIRD includes a field that was vacant in 1990 and remains vacant today, and proposes a Neighborhood Commercial designation for this vacant field.[224]

The County notes that in support of its decision the Council made the following conclusion:

> Establishing the designation boundary to include the area characterized by more intense and felt in 1990 preserve the character of the existing natural neighborhood, follows physical features (SR 542 and Van Wyck Road) and avoids an abnormally irregular boundary.

In addition the County points out that the entire LAMIRD is only 6 acres in size. With regard to Participants' challenge of the inclusion of a vacant parcel to the north of SR 542, this property was included because it has a water meter connected to a waterline installed prior to 1990, the County argues.[225]

The Board finds that much of the Van Wyck LAMIRD was characterized by the built environment in 1990, including various commercial businesses. However, for reasons set forth above, the Board finds that the presence of a water meter on an otherwise vacant lot in 1990 did not characterize the lot on the northwest portion of the LAMIRD as containing more intensive rural development, nor was the inclusion of this property within the LOB necessary to preserve an existing neighborhood, follow a physical boundary, prevent an abnormally irregular boundary, or enhance the ability to provide public facilities and services in a manner that does not permit low-density sprawl.

Conclusion: The Board concludes that, except for that property which was vacant in 1990 except for the presence of a water meter, which the Board concludes was erroneously included within the LOB, the Van Wyck LAMIRD was properly designated.

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[224] Participants' Objections at 18.
[225] County Response to Objections at 27.

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Emerald Lake

Summary Description: The Emerald Lake affected area consists of about 627 acres zoned R-2A and RR-2 with no nonresidential uses. The affected area is located adjacent to the northeast boundary of Bellingham's UGA. During the recent review of Whatcom County's UGA's the area was not proposed for inclusion in the Bellingham UGA.

The northern part of the affected area is a small-lot subdivision platted around 1960 and characterized by considerable buildout in 1990 and since. The portions to the south are characterized by larger lots (an average lot size of about 6 acres). The proposed LAMIRD boundary follows the outer edge of the small-lot subdivision. The larger-lot area to the south outside the LAMIRD boundary is proposed for R-5A and RR-5A zoning.[226]

The City argues that the Emerald Lake area does not meet the County's criteria for a LAMIRD, and specifically is contrary to Plan Policy 2HH-1(A) (3) because it is adjacent to the Bellingham UGA and does not meet the standards of Plan Policy 2HH-1(B) (1) because the area does not serve as a hub of public and commercial services for the area.

The County's brief incorporates by reference the information provided in the LAMIRD Report concerning this area and the reasons for including it in a Type I LAMIRD. It notes that, in support of its decision, the Council made the following conclusion:

> While the majority of the platted lots in the Emerald Lake subdivision had yet to be developed individually in 1990, roads and utilities had been installed. Establishing the designation boundary to include the entire subdivision preserves the character of the existing natural neighborhood and avoids an abnormally irregular boundary. [227]

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[226] Ex. R-001 at 22.
[227] Ex. D-003, p. 16

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The County points out that the total area affected by the Board's 2005 decision in the vicinity of Emerald Lake was 627 acres.[228] Of those acres, only 143 in the northern portion were included in this LAMIRD. This area contains a small-lot subdivision platted in 1960, with considerable development in 1990 *and since*. The remaining 484 acres were down-zoned to either R5A (Rural 1 du/5 acre) or RR5A (Rural Residential 1 du/5 acre).

The Board finds that the County included within the Emerald Lake LAMIRD LOB properties which, according to the County's own LAMIRD report had not been developed in 1990. Extending the LOB to include the outer edge of the platted but unbuilt small-lot subdivision was not necessary to address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries, such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, or (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl. Instead, the LOB, as drawn, facilitates sprawl.

Conclusion: The Board concludes that the County was clearly erroneous in including within the Emerald Lake LAMIRD LOB those properties south of the lake which had yet to be developed in 1990.

Sudden Valley

Summary Description: Sudden Valley is a large development on the south shore of Lake Whatcom containing primarily single-family residential uses but also providing recreation, goods, and services to the local residents through community recreational facilities, a convenience store/restaurant, professional services offices, and a community center. Small pockets of multi-family residential exist as well. The affected area also includes open spaces, many of which are zoned R-5A, and a row of residences along the Lake Whatcom shoreline on Lake Whatcom Boulevard.

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[228] Ex. R-001, p.22

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The Sudden Valley development was platted and largely developed by 1990. The proposed LAMIRD boundary follows the extent of the 1990 developed area. Included within the interior of the LAMIRD are golf course parcels and other community-association-owned open space lands that are zoned R-5A, which would maintain their less intensive development patterns through implementation of Comprehensive Plan policies and zoning regulations. The existing commercial and multi-family uses would be contained within the STC zoning, which permits a mix of limited commercial and residential uses.[229]

The City acknowledges that Sudden Valley is a valid LAMIRD. However, it argues that given the environmental constraints and the degradation already occurring in Lake Whatcom the County should not have allowed small lot zoning on the lake edge.

The County again incorporates by reference the information provided in the LAMIRD Report concerning this area and the reasons for including it in a Type I LAMIRD. It notes the Council made the following conclusion:

> While the majority of the platted lots had yet to be developed individually in 1990, roads and utilities had been installed within the subdivisions. Establishing the designation boundary to include the area characterized by more intensive development in 1990 preserves the character of the existing natural neighborhood, follows physical features (Lake Whatcom Boulevard and Lake Whatcom shoreline), and avoids an abnormally irregular boundary. [230]

The Board agrees that the Sudden Valley area was properly designated as a LAMIRD. The only area in dispute is a small segment that includes several developed shoreline lots along Lake Whatcom Boulevard. However, this area was characterized by the built environment in 1990 and, of the 45 lots in this segment, only one is large enough to be subdivided.

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[229] Ex. R-001 at 54.
[230] Ex. D-003, p. 18.

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Conclusion: The Board concludes that Petitioner has not carried its burden of proof to demonstrate that the County committed clear error in designating the Sudden Valley LOB.

Cain Lake

Summary Description: The Cain Lake affected area is located around Cain Lake, south of Lake Whatcom. The area totals about 859 acres of R-2A zoning, including one nonconforming commercial use, a store on Cain Lake Road.

Cain Lake Road divides the affected area roughly in half. West of the road is a series of subdivisions platted decades ago and characterized by considerable buildout, including roads and utilities, in 1990 and since. East of the road is a series of parcels ranging from 2 to 80 acres in size, with an average parcel size of about 11 acres. The west side of the road is proposed for LAMIRD status, retaining its R-2A zoning, while the east side of the road is proposed for R-5A zoning.[231]

The City argues that the 1991 aerials show that this area had very limited small lot development adjacent to the lake. Aside from roads, it states this area had no other development. It further argues that designation of this area is contrary to County Plan Policy 2HH-1B(b)1 because the area does not serve as a hub of public and commercial services.

Here again the County incorporates by reference the information provided in the LAMIRD Report concerning this area and the reasons for including it in a Type I LAMIRD. In support of its decision, it notes the Council made the following conclusion:

> While the majority of the platted lots had yet to be developed individually in 1990, roads and utilities had been installed within the subdivision. Establishing the designation boundary to include the entire subdivision preserves the character of the existing natural neighborhood, follows physical features (Cain Lake Road and Camp 2 Road), and avoids an abnormally irregular boundary.[232]

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[231] Ex. R-001 at 12.
[232] Ex. D-003 p. 16.

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The total area affected by the Board's 2005 decision in the vicinity of Cain Lake was 859 acres.[233] Of those acres, only 363 in the western portion were included in this LAMIRD. This area contains a series of subdivisions platted decades ago, with considerable development in 1990 and since. The remaining acres were down-zoned to R5A.

In examining the evidence of the 1990 built environment, as shown by the 1991 aerial photo, the Board concludes that there was considerable development west of Cain Lake Road. While Petitioner appears to argue that the area east of Cain Lake Road was largely undeveloped, that area is not proposed for inclusion in the LOB.

Conclusion: The Board concludes that Petitioner has not carried its burden of proof to demonstrate that the County committed clear error in designating the Cain Lake LAMIRD LOB.

F. Population Allocation to LAMIRDs and Rural Areas

Hirst Issue 4: *Did the County's adoption of the Ordinance, Sections 1, 2, and 3, fail to comply with RCW 36.70A.115 and 36.70A.110, requiring that amendments to comprehensive plans and development regulations provide sufficient capacity of land to accommodate housing and employment growth as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast, RCW 36.70A.070(1), requiring future population growth estimates in the land use element, RCW 36.70A.070(5), requiring appropriate rural growth and limiting LAMIRDs, RCW 36.70A.020(1) and (2), encouraging development in urban areas and discouraging sprawl, RCW 36.70A.030(15)(16) and (19), RCW 36.70A.130(1), RCW 36.70A.210, establishing countywide planning policies as the framework to ensure city and county comprehensive plan consistency, and RCW 36.70A.070 (preamble) requiring internal consistency, because the designation and zoning of rural land and LAMIRDs results in population and employment that exceeds the allocation of housing and employment to Rural areas and substantially impedes the goal of accommodating housing and employment in urban areas?*

Discussion

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[233] Ex. R-001, p.22.

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Hirst argues that the Comprehensive Plan and development regulations violate the GMA because they permit additional population to be allocated to rural areas far in excess of the prior allocation -- 33,696 additional people where only 2,651 are expected.[234]

In response, the County argues that the Board addressed this very argument in *Friends of Skagit County, et al, v. Skagit County*[235] where the Board held that RCW 36.70A.115 does not impose an obligation on counties to conduct a needs and capacity analysis for areas outside the UGAs and that that provision does not require a rural lands analysis but instead merely requires the County to ensure sufficient capacity of land for development to accommodate the growth allocated in the County's countywide planning policies. To the extent that Petitioner is making this argument, and Hirst disputes that they are, the Board agrees with the County that RCW 36.70A.115 creates no such obligation.

However, the County does not address what the Board finds to be a more fundamental problem, and that is the County's own growth allocation to rural areas. As noted in a cogent law review article cited with approval by our Court in the *Thurston County v. WWGMHB*[236] decision,

> How to allocate population growth is a threshold policy decision that reflects what portion of the projected countywide growth will be directed into each area of the county. Like all other GMA-related decisions, a county's allocations to both UGAs and rural areas must be substantially guided by the Act's policy goals in order to be in compliance with the GMA. A finding of noncompliance or invalidity could be warranted if a county's allocations fail to: (1) channel growth into UGAs and discourage sprawling development patterns; or (2) account for realistic indicators of future development, such as the presence of undeveloped residential lots in rural areas, that will invariably effect the distribution of population growth throughout the county. Once the allocations are made, a county should ensure that the size and density levels of its UGAs and rural areas are commensurate

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[234] Hirst Brief at 49.
[235] WWGMHB No. 07-2-0025c, Final Decision and Order, pp. 43-45 (5/12/2008).
[236] 165 Wn.2d 329 (2008)

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> with the allocations and consistent with the requirements for urban and rural densities.[237]

The author also points out:

> Quite unlike the requirements for UGAs, which make size and density dependent on OFM growth forecasts, the Act on its face provides no such direction to counties in determining how much land should be included in rural areas or what range of rural densities is acceptable. Indeed, specific mention of OFM projections within the GMA itself is confined to the provisions concerning UGAs, planned master communities, and resorts. Despite the absence of an explicit statutory link between rural comprehensive planning and population projections, however, several board decisions have held that counties must allocate OFM's countywide projection among both the urban and rural areas within their borders. This requirement was first announced in *Edmonds v. Snohomish County*, a 1993 case in which the Central Board held that counties must allocate the OFM projection among all "incorporated and unincorporated UGAs and non-UGAs." Allocation is necessary, the Board observed, "in order to achieve the consistency and coordination of comprehensive plans ... and to give force and effect to the [UGA] designations as required by RCW 36.70A.110."(citations omitted)[238]

The County's Comprehensive Plan allocates growth to urban and rural areas based on the Office of Financial Management's (OFM) twenty-year forecast. This allocation is depicted in the Plan at Table 4. As the County Comprehensive Plan notes:

> **Table 4** shows how the total projected 2029 population would be distributed assuming: 1) that all of the UGAs have been annexed into existing cities; 2) that each urban area receives a share of the county's overall growth; and 3) that the portion of growth to urban areas is approximately 85% of county-wide growth, with the balance to rural areas.[239]

Table 4 allocates 67,692 people to unincorporated rural Whatcom County. The 2010 population census shows there are 65,041 people in the County rural areas, thus allowing for only 2,651 additional people by 2029. Hirst's unrebutted evidence demonstrates that

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[237] Brent D. Lloyd Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning under the Washington State Growth Management Act, 36 Gonz. L. Rev.73, at 141-142.
[238] Id. at 130
[239] Whatcom County Comprehensive Plan at 1-6.

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vacant lots in existing rural areas can accommodate 33,696 additional people, where only 2,651 are expected and the parcels created by the County's LAMIRD designations alone result in the potential for an increase in population of 4,512. Hirst argues, and the Board agrees, that the County has not planned to ensure that its comprehensive plan and development regulations, considered together, allocate rural population consistent with the Comprehensive Plan's population allocation. The additional residential development allowed in the County LAMIRDs conflicts with the goal of locating most population increases in UGAs and encourages sprawl.

The Board concludes that the County's Comprehensive Plan amendments and development regulations permit a population in the County rural areas far in excess of the allocation elsewhere provided for in the County Comprehensive Plan, thereby creating Plan inconsistency in violation of RCW 36.70A.070 (preamble) and RCW 36.70A.130(1).

Conclusion: The Board concludes that Hirst has not carried its burden to establish a violation of RCW 36.70A.115. However, the Board concludes that its Comprehensive Plan amendments and development regulations permit a population in the County rural areas far in excess of the allocation elsewhere provided for in the County Comprehensive Plan, thereby creating Plan inconsistency in violation of RCW 36.70A.070 (preamble) and RCW 36.70A.130(1). Other alleged GMA violations raised in Hirst's Issue 4 were either not argued and are deemed abandoned, or were not persuasive.

G. Chuckanut/Lake Whatcom/South Bay Rural Density

Bellingham Issue 3a: *Did the amendments redesignating and rezoning the rural area violate GMA's requirements under RCW 36.70A.020(1), .020(2), .020(10), .020(12), .040, .070 (preamble), .070(3), .070(5)(a –d), .070(6), .110(1), .120*[240]*, because the amendments,*

[240] In its argument the City fails to cite any of these sections nor explain how they are violated by the County density overlay. Instead it "incorporates by reference" the discussion in Issue 2 which pertains to LAMIRDs. It is not for the Board to make the City's argument for them.

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among other things, failed to protect rural character and the environment, including groundwater resources, including but not limited to the rural areas listed as follows:

a. *Chuckanut/ Lake Whatcom/South Bay Rural Residential Density Overlay*

Futurewise Issue 2a: *Do the development regulations as amended by Ordinance No. 2011-013 Sections 2 and 3, Exhibit B: Zoning Code Amendments, and Exhibit C: Official Zoning Map and Comprehensive Plan Map Amendments violate RCW 36.70A.020(1), (2), (8), (9), and (10); RCW 36.70A.030(15); RCW 36.70A.040; RCW 36.70A.060; RCW 36.70A.070; RCW 36.70A.070(1); RCW 36.70A.070(5); RCW 36.70A.110; and RCW 36.70A.130(1) and (4)?*

These violations include the following:

> *Do the development regulations in Whatcom County Code Title 20 Zoning and Whatcom County Code Sections (WCC) 20.32.252 and WCC 20.36.252 fail to include measures that apply to rural development and protect the rural character of the area as established by the county as required by RCW 36.70A.070(5)(c)*[241] *and RCW 36.70A.040?*

Discussion

The City argues that, rather than containing urban development in the cities and UGAs, the County has allowed sprawling development through its "rural density overlay" in the Chuckanut, Lake Whatcom and South Bay areas.[242] The City notes that the Chuckanut area is environmentally constrained with steep slopes, fish bearing streams, and a large wildlife corridor. Further, it notes that this area does not have water service from the City of Bellingham. The City argues that the rural density overlay will promote sprawl and pre-GMA zoning patterns in an ecologically sensitive area without services. It further argues that the application of the rural residential overlay in this area violates Plan Policy 2-EE2 pertaining to the availability of rural government services and Policy 2-GG3 which requires public water service to be available to the area.

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[241] The issue of the adequacy of the Rural Element measures required by RCW 36.70A.070(5)(c) is addressed elsewhere in this order.
[242] City Brief at 42.

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The City argues that the County has placed a LAMIRD in Sudden Valley, in the Lake Whatcom watershed, and allowed more density via the rural residential overlay in an area where the City maintains water rights to provide municipal water to over half the county population. The City argues that increased densities would increase harmful stormwater runoff and phosphorous loading into Lake Whatcom, and that this is *per se* inconsistent with rural character and the need to preserve natural drainage ways.

The Board notes that other than repeating the list of statutes in the statement of Legal Issue 3,[243] the City made no argument tied to these provisions. In its Prehearing Brief, the City fails to cite any of the GMA provisions alleged to have been violated or to explain how the statutory requirements apply to the County's overlay for Chuckanut and Lake Whatcom.

WAC 242-03-590(1) provides in part "Failure … to brief an issue shall constitute abandonment of the unbriefed issue."[244] The Board has explained, "An issue is briefed when legal argument is provided."[245] It is not enough to simply cite the statutory provision in the statement of the Legal Issue.[246] A petitioner's brief must contain facts and arguments explaining how the challenged action failed to meet any applicable requirements of the cited statutes.

In the present case, while the City's briefing includes facts and argument about the environmental sensitivity of the Lake Whatcom and Chuckanut areas, nowhere in the Legal

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[243] City Prehearing Brief at 41, 43

[244] See *City of Bremerton v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5; *TS Holdings v. Pierce County,* CPSGMHB Case No. 08-3-0001, Final Decision and Order (Sep. 2, 2008), at 6.

[245] *Tulalip Tribes of Washington v Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

[246] See *North Clover Creek II v Pierce County*, CPSGMHB Case No. 10-3-0015, Final Decision and Order (May 17, 2011) at 11, and *TS Holdings v. Pierce County,* CPSGMHB Case No. 08-3-0001, Final Decision and Order (Sep. 2, 2008), at 7 (both cases dismissing challenges based on GMA provisions only cited by Petitioner in restating the Legal Issues in the case).

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Issue 3 briefing is there any argument or authorities based on the specific requirements of RCW 36.70A.020(1), .020(2), .020(10), .020(12), .040, .070 (preamble), .070(3), .070(5)(a – d), .070(6), .110(1), .120.[247] Therefore the Board finds and concludes that the City's Legal Issue 3 challenge was abandoned.

Futurewise points out Whatcom County Code (WCC) 20.32.252, Rural Residential Density Overlay, and WCC 20.32.253, Maximum Density and Minimum Lot Size, allow lots as small as one-acre.[248] The R2A zone allows densities of one dwelling unit per two acres.[249] The Point Roberts Transitional Zone allows densities as high as one dwelling unit per acre.[250] It argues that these high rural densities violate the GMA since the State Supreme Court, in *Thurston County*[251] has held that "rural density" is 'not characterized by urban growth' and is 'consistent with rural character.' Futurewise asserts that five acres is the minimum amount of land that can support even a small farm and the average farm in Whatcom County is 69 acres. Futurewise maintains that one and two acre lots are too small to support the production of agricultural products, the extraction of mineral resources or to support natural resource lands.[252] It argues that lots that are too small to support these rural uses are by definition "urban growth". It essentially urges the Board to hold as a bright line rule that rural densities greater than one house per five acres violated the GMA and lots as small as one acre violate the GMA.

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[247] See also the standard applied by the Courts in review of Board decision under the APA: *Clallam County/Dry Creek Coalition v WWGMHB,* Court of Appeals Div. II, Case No. 39601-7-II (Apr. 20, 2011), Slip Op. fn. 15:

> But the County presents no substantive arguments addressing these alleged errors under the APA. Thus, we do not consider any possible errors on these grounds. RAP 10.3(a)(6); *Hollis v Garwall, Inc.*, 137 Wn.2d 683, 689 n. 4. 974 P.2d 836 (1999); *see also Holland v City of Tacoma,* 90 Wn. App 533, 538, 954 P.2. 290 ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."), *review denied*, 136 Wn.2d 1015 (1998).

[248] WCC 20.32.252, Rural Residential Density Overlay, and 20.36.253, Maximum Density and Minimum Lot Size, in IR D-003 in Tab 2011-013, Whatcom County Ord. No. 2011-013 Exhibit B Zoning Code Amendments pp. 12 – 13 of 65; pp. 17 – 18 of 65.

[249] Tab 20.36, WCC 20.36.253 Maximum density minimum lot size pp. 16 – 17 of 22.

[250] Tab 20.37, WCC 20.37.253 Minimum lot size and maximum density pp. 8 – 9 of 12.

[251] 164 Wn.2d 329, 359, 190 P.3d 38 (2008)

[252] Futurewise Brief at 37.

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Relying upon exhibits proffered in its Motion to Supplement the Record, but denied by the Board, Futurewise attempts to argue that the County allows densities at odds with the County's rural character. Such evidence will not be considered.

Futurewise further argues that the pattern of one and two acre lots in Whatcom County north of Bellingham and east of Ferndale are intensely built out and not open, at odds with RCW 36.70A.030(15)(a)'s definition of rural character. It argues that in the areas of one and two acre lots, open space and the natural environment do not predominate, they do not foster traditional lifestyles.

The County responds that Futurewise's argument is based on a faulty premise that to be rural a parcel needs to be capable of supporting agriculture or forestry. It argues that Futurewise's focus on agricultural use as defining when a parcel is not urban is incorrect based on the GMA's definition of urban. RCW 36.70A.030(17) defines urban growth as:

> " … growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces **to such a degree as to be incompatible with** the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, **rural uses, rural development**, and natural resource lands designated pursuant to RCW 36.70A.170 …" (emphasis added)

The County points out that several of the rural areas of the County with parcels less than five acres in size are classified by the Whatcom County Assessor's Office as producing sufficient income from commercial agricultural activity to be taxed as Agricultural – Open Space. [253]

The County asserts Futurewise's claim that many rural lots in the County are too small to support "the production of agricultural products, the extraction of mineral resources and natural resource lands" is misleading because it neglects to mention that the rural areas are

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[253] Ex C-079L (Whatcom County Rural Land Study Exhibit C).

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not the County's designated resource lands and that an area is only urban if it also is incompatible with rural uses and rural development.[254] Rural uses include opportunities to live and work in the rural area as well, the County states. [255]

Arguments that small lots create problems such as surface water runoff, contaminated wells and failing septic systems are speculative in nature, according to the County, and ignore the fact that the County has development regulations to address these issues through zoning and building codes. These development regulations are required for consistency with the Plan, as the Plan specifically requires several protections for the environment including:

> Policy 2DD-2: Protect the character of the rural area in terms of natural landscape as well as rural lifestyles and economy, per the GMA definition of rural character (RCW 36.70A.030(15)). **Protect and value clean water and air, the natural environment, forested lands, agriculture, parks, trails, and open space that provide for a high quality rural lifestyle**. (emphasis added)
>
> Policy 2DD-4: Conserve open space, park land, and trails for recreational use, as well as to **protect essential habitat such as riparian areas and wetlands.** (emphasis added)

The Board finds that the Rural Residential Density Overlay was applied in areas where development has occurred at a variety of densities and average parcel size is less than five acres. While the areas that are now subject to the overlay were down-zoned, under certain circumstances, property owners may be able to create lots smaller than the base density allows. To qualify for a lot size smaller than five acres in the RR-5A zone, the following criteria must be met:

> (1) Eligibility. Eligibility for the density overlay is limited to lots that meet the following:
> (a) Public water must be available, and
> (b) At least 70% of lots wholly or partially within 500 feet of the subject lot's outer boundary must have contained a residence and been under five acres in size on [effective date of this ordinance].

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[254] RCW 36.70A.030(17).
[255] RCW 36.70A.030(15).

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> (2) Calculation. Within this overlay the permitted minimum lot size for a lot is equivalent to the mean lot size of all lots that contained a residence on [effective date of this ordinance] and are wholly or partially within 500 feet of the lot's outer boundaries, or one acre, whichever is greater. This calculation is subject to the following:
> (a) No lots within a city, urban growth area, or LAMIRD (Rural Community, Rural Tourism, or Rural Business comprehensive plan designation) may be included in the mean lot size calculation, and
> (b) Lot sizes existing on or before [effective date of the ordinance], shall be used in the mean lot size calculation.

The record demonstrates that in the Lake Whatcom Watershed, where some of the overlays exist, the number of lots that are likely to meet the eligibility criteria is disputed.[256] The County produced a staff memorandum indicating a likely minimal infill from application of the RRDO – as little as 8 new lots in the Sudden Valley LAMIRD.[257] The Petitioners questioned the County's calculations and assumptions, providing their own GIS analysis – determining the RRDO in the Lake Whatcom R2A zones alone would allow 25 additional lots.[258].

While the Board recognizes that further use of the density overlay could lead to sprawling development inconsistent with rural areas, the provisions in Ordinance 2011-013 apply to infill in mapped areas and measured by adjacent development as of 2011. That is, the RRDO is a one-time infill opportunity, as defined in the development regulations, not an invitation to on-going density increases. Nevertheless, as discussed in Section C above, the County should adopt measures in its Rural Element, restricting the use of the density overlay to infill as of 2011 so that it does not become a basis for future rezoning.

Petitioners raise particular concerns over the impact of the density overlay provisions in the Lake Whatcom watershed. Based on the Staff memorandum, the County in its public process asserted only one additional property would be likely to benefit in the Sudden

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[256] Compare, Ex. R-007, at 2 (17 new lots) and Ex. C-003, p. 5 (25 new lots).
[257] 4/5/11 Staff memorandum, Ex. R-007 estimating as few as 8 additional new lots in the Lake Whatcom area.
[258] Ex. C-003, p. 5

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Valley RRDO. Relying on this analysis, Steve Hood, of the Washington State Department of Ecology, while noting critical concerns over additional phosphorous in Lake Whatcom, in his comments at a hearing stated: "It appears that the only property owner to actually benefit from the Density Overlay is the Washington Department of Natural Resources."[259] It appears from his comments that he was concerned about the granting of a "special privilege" to a public entity (DNR) not available to other landowners.[260]

In *Dry Creek*, this Board found the overlay zone to be compliant with the rural provisions of the GMA because it authorized densities that reflected the existing landscape of the areas and would not lead to "the inappropriate conversion of undeveloped lands into sprawling, low-density development." The County established very strict eligibility requirements in those areas.

In the present case, the density overlay, potentially allowing for a small number of lots smaller than five acres in size in a total area comprising only 1.4 percent of all county rural lands, will not lead to the "inappropriate conversion of undeveloped lands into sprawling, low-density development" if contained by the Comprehensive Plan measures indicated in this Order.

Conclusion: Petitioners have not demonstrated that the development regulations permitting the Rural Residential Density Overlay based on 2011 infill violate the GMA. The Comprehensive Plan provisions, however, must contain measures to "contain and control" application of the RRDO, at set forth in Section C of this Order, and measures to protect surface and groundwater resources, as set forth in Section K below.

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[259] Ex. C-001.

[260] Hood went on to protest the doubling of impervious surfaces allowed under the RR5A designation. Ex. C-001.

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H. Written Record

Hirst Issue 7: *Did the County's adoption of the Ordinance, Sections 1, 2, and 3, fail to comply with RCW 36.70A.070(5) because the revised Comprehensive Plan provisions governing rural development and the implementing regulations do not harmonize the planning goals in RCW 36.70A.020, including Goals 1, 2, 8, 9, 10 and 14?*

Bellingham Issue 5: *Did the County consider local circumstances, but fail to develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA, in violation of RCW 36.70A.070(5)(a)?*

Discussion

RCW 36.70A.070(5)(a) states:

> Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

Hirst first argues the Rural Element in the Comprehensive Plan must achieve and document this harmonization of GMA planning goals without reliance on development regulations, otherwise there is no constraint on the rezoning of property in rural areas, violating Goal 2.[261] Hirst asserts the County's plan does not guarantee a variety of rural densities. [262] Hirst objects that there is no explanation for inadequate agricultural setbacks.[263] Hirst maintains that the County has not complied with Goal 10 (protection of the environment) because the goal-harmonization statement focused solely on policies for on-site sewage and stormwater, while failing to address water quality impacts on Lake Whatcom. Finally, Hirst contends the County focused only on those goals that suit its purposes. Thus, according to Hirst, the County totally fails to harmonize GMA Goal 1 (encourage development in urban areas)

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[261] Hirst Brief at 66-67, "…there is no guarantee in the County's entire scheme that would prevent the rural area from rezoning to small lot residential or high-intensity commercial or industrial uses."
[262] Goal 4: "…promote a variety of residential densities…"
[263] Goal 8: "… encourage the conservation of productive agricultural lands and discourage incompatible uses."

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because the rural element competes with urban areas for development; Goal 9 (retention of open space); or "Goal 14"[264] (the goals and policies of the Shoreline Management Act).

The City contends RCW 36.70A.070(5)(a) calls for a more explicit record of goal harmonization than the County has provided. Instead, the City argues, the County's documents are not clear in their description of how policies which allow increased density and sprawling growth in the rural area are in harmony with the GMA goals and with the County's professed goals to protect critical areas and Lake Whatcom.[265]

The County argues that it has concise Findings of Fact and Conclusions of Law that accompany the Ordinance[266] and that these findings provide a succinct summary of much of the relevant evidence relied on by the County. It maintains that its conclusions provide an analysis of how the various goals and policies harmonize with the planning goals of RCW 36.70A.020 and the overall GMA. It references six pages of conclusions the County reached by applying relevant information about local circumstances to the applicable statutes including Conclusion No. 2 that specifically addresses harmonizing the GMA planning goals.[267] The County cites to *Friends of Skagit County, et al, v. Skagit County*[268], where the Board stated, "[I]t is not a requirement that the County develop a separate statement if its CP is clear in its description of how its amendments harmonize with the overall goals in Section 020."

The Supreme Court has provided recent guidance on the written record required under RCW 36.70A.070(5)(a). In its *Kittitas County* ruling,[269] the Court noted the GMA specifically allows counties to consider local circumstances when planning a rural element, providing

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[264] See, RCW 36.70A.480(1).
[265] City Brief at 46.
[266] Ex. D-003 (Ordinance No. 2011-013, 5/10/11).
[267] Ex. D-003 (Ordinance No. 2011-013, 5/10/11) pg 13-14.
[268] WWGMHB No. 07-2-0025c, Final Decision and Order, pp. 43-45 (May 12, 2008).
[269] *Kittitas County v EWGMHB,172 Wn.2d at 159*

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that the county develops a written record explaining how the rural element harmonizes the GMA planning goals and meets GMA requirements. The Court accepted the Board's prior decisions that a "written record" need not be a discrete document.[270] Nevertheless, the Court agreed with the Board that Kittitas County's reference to community testimony and to goals, policies and objectives in its plan did not constitute the written record required by the statute. The Court explained:[271]

> The GMA is clear that, to the extent counties consider local circumstances in planning the rural element of their comprehensive plans, they must develop some kind of written explanation. The County does not dispute that it considered local circumstances. Looking then to the record before the Board, even with great deference to the County, there simply is no written explanation that articulates how the County's rural element harmonizes the goals and meets the requirements of the GMA. The significance of the County's failure to develop an explanation of local circumstances is strongly felt, as we weigh the other issues about which we and the Board would have benefitted from additional information and analysis of local circumstances.

The Court affirmed the Board's findings and orders that Kittitas County violated the GMA by failing to develop the required written record.

In the present case, the Board first acknowledges Whatcom County did not have the benefit of the Court's ruling when Ordinance 2011-013 was adopted. Nevertheless, the County provided a succinct summary in the Ordinance's Findings and Conclusions referencing specific portions of the Rural Element or development regulations responsive to the GMA goals the County deemed relevant.[272] The Board agrees with the County that this is a reasonable format for the "written record" required by RCW 36.70A.070(5)(a). While information about unique local circumstances could have been more specific, the County's

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[270] Citing *Bayfield Res. Co. v Thurston County*, No. 07-2-0017c, Final Decision and Order (April 17, 2008), at 3, and *Suquamish Tribe v Kitsap County*, No. 07-3-0019c, Order Finding Compliance (Aug. 15, 2007), at 33.
[271] 172 Wn.2d at 159
[272] Goal 2 (prevent sprawl), Goal 5 (economic development) [incorrectly referenced as Goal 3], Goal 6 (property rights), Goal 8 (natural resource industries), Goal 10 (water quality and supply), Goal 11 (public participation).

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Findings and Conclusions, read together with the cited Rural Element provisions, contain an explanation of the County's choices in light of a number of GMA goals.[273] However, as set forth above, the County failed to comply with certain GMA requirements, and that failure cannot be cured by a "goal harmonization" rationale.

The Board has determined, above, that Ordinance 2011-013 does not comply with the statutory requirements for the Rural Element and does not sufficiently contain sprawl or direct growth into the urban area. In the sections to follow, the Board finds Ordinance 2011-013 fails to protect water quality. On compliance, the County will necessarily revise its written record harmonizing the GMA planning goals.[274]

Conclusion: Petitioner has failed to demonstrate that the County failed to develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020.

I. Intergovernmental Coordination for Services

The City of Bellingham's Issues 1, 8, and 9 raise overlapping challenges of consistency and coordination. The Board addresses these issues as a group.

Bellingham Issue 1: *Did the amendments violate the requirements for coordinated comprehensive planning between counties and cities, under RCW 36.70A.070 (preamble), .100, .210(1), and Countywide Planning Policies (CWPP) including but not limited to F(6), F(7), J(7), J(8) and M(1) and the Whatcom County Comprehensive Plan, including but not limited to Goal 4H and its implementing policies, because:*

a. *The County failed to consult with the City on the amendments and the amendments failed to include public infrastructure planning consistent with City or other outside provider plans, including transportation, utility, fire service and police service plans;*
b. *The impacts on the City's transportation and utility infrastructure as a result of the County's amendments will be greater than impacts typical of rural densities*;

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[273] As Petitioner Hirst pointed out, the County's written record bypassed Goal 1, Goal 9 (open space, fish and wildlife habitat), and "Goal 14" (protecting Lake Whatcom as a shoreline of statewide significance).
[274] The County on compliance will take into consideration the Supreme Court's emphasis on local circumstances and the Board's rulings herein related to Goals 1, 2, 8 and 10.

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c. *The traffic impacts of the amendments are inconsistent with the City's updated Comprehensive Plan, which was based on analysis of the City's five-year review areas, and therefore the County should have conducted coordinated transportation planning with the City prior to adoption of the amendments;*
d. *The rural element amendments include LAMIRDS or other increases to rural density that are not considered as a part of a capital facilities analysis or as a part of a joint transportation analysis that will affect the City's public infrastructure*;
e. *The County failed to update its capital facilities plan to coordinate with its land use plan, it failed to coordinate its capital facilities planning with the City's capital facilities plan;*
f. *The County failed to coordinate its planning with City plans to ensure pedestrian and bicycle corridors and safe non-motorized transportation*

Bellingham Issue 8a: *Did the amendments violate the internal consistency requirements of GMA, RCW 36.70A.070 (preamble), .070(6) and .120 because: (a) The County did not amend its transportation element or its capital facilities plan to make them consistent with the new rural element;*

Bellingham Issue 9: *Did the amendments violate RCW 36.70A.020(12), .040(3) and .120, which require that: (a) implementing development regulations be consistent with comprehensive plan policies; (b) infrastructure be in place at the time of development; and (c) planning decisions be consistent with budget decisions and adopted capital facility plans, because the amendments allow development that is inconsistent with adopted utility and capital facilities plans and the amendments are otherwise inconsistent with the following policies of the Whatcom County Comprehensive Plan:*
d. Policies 2EE-7 and 2EE-8

Discussion

In these interwoven issues, Bellingham makes three claims:

- The County's Rural Element violates the internal consistency requirement of RCW 36.70A.070 (preamble) and .120 because the County did not revise its own Capital Facilities Plan and Transportation Plan consistent with the new land use provisions.
- The County violated the requirement for external coordination and consistency found in RCW 36.70A.100 because the impacts of the County's new land use provisions are inconsistent with the City's adopted Comprehensive Plan, including transportation, utility, fire service and police service plans.
- The County failed to consult and coordinate with the City as required by RCW 36.70A.100, .210(1), Countywide Planning Policies (F7) and Comprehensive

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Plan Goal 4H, particularly with respect to the infrastructure and services needed for LAMIRDs and areas of increased rural densities. This also violated RCW 36.70A.020(12) which requires timely provision of public services to support development.

Internal Consistency[275]

RCW 36.70A.070 (preamble) requires: "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map." RCW 36.70A.070(3) sets forth the requirements for the capital facilities element. RCW 36.70A.070(6) contains the transportation element requirements.

The City cites Board rulings establishing that when a city or county makes changes to land use provisions, it must ensure that its transportation plans and capital facilities plans are consistent.[276] The City states that the County did not amend its CFP or TIP to reflect changes arising from the newly-adopted Rural Element. The City asserts the County is in violation of RCW 36.70A.070(3) – requiring consistency between land use and the capital facilities element – and RCW 36.70A.070(6) – requiring consistency between land use and the transportation element.

At the outset, the Board finds Bellingham's statement of Legal Issues 1, 8 and 9 does not include a charge of non-compliance with RCW 36.70A.070(3) – the Capital Facilities Element.[277] Regardless of the persuasiveness of the City's arguments of law, the Board is prohibited from entering "an advisory opinion on issues not presented to the Board in the

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[275] Bellingham Issues 8a and 1d and e.

[276] The City cites *Fallgatter IX v City of Sultan,* CPSGMHB Case No. 07-3-0017, Final Decision and Order), at 15, and *McVittie v Snohomish County*, CPSGMHB Case No. 99-3-0016c, Final Decision and Order (Feb. 9, 2000).

[277] This is not a mere technical flaw. Because no CFP violation was alleged in the statement of issues, the County's 2009 CFP was not provided to the Board until late in the process. Portions of the CFP were attached to the City's Reply Brief. Briefing and argument about alleged inconsistencies was truncated, and the Board was not prepared to ask questions.

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statement of issues."[278] The Board therefore must disregard the City's arguments concerning the County's violation of RCW 36.70A.070(3) or inadequacy of the County's capital facilities planning.[279]

As to alleged internal inconsistency between the Rural Element and the County's transportation plan, the County asserts Ordinance 2011-013 down-zoned approximately 5,300 acres in the rural area and substantially reduced the size of the previous areas of more intensive rural development. Therefore, the County contends, no new traffic impacts are anticipated and no update to the County transportation plan is required.[280]

The City argues the County's designation of specific LAMIRDs which will have unique impacts calls for a revised transportation plan. However, the City fails to identify specific inadequacies of the County's provisions for transportation; rather, Bellingham's arguments pertain to how the County's land use actions impact the City's transportation plan. The Board finds the City failed to support its internal inconsistency argument with facts in the record.

External Inconsistency[281]

RCW 36.70A.100 provides:

> The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties and cities with which the county or city, has, in part, common borders or related regional issues.

Bellingham contends the County failed to coordinate with the City and, as a result, adopted provisions for the rural area that are inconsistent with the City's transportation and capital

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[278] RCW 36.70A.290(1)
[279] The County will of course take note of the requirement for RCW 36.70A.070(3) consistency in connection with land use actions it undertakes in compliance with this Order.
[280] County Brief at 110-112
[281] Bellingham Legal Issues 1b, c, d, and f.

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facilities plans.[282] The City asserts its 2006 plan update identifies limits on police and fire service capacity, water supply, parks, and transportation facilities. More intense rural development at the City's doorstep, it contends, is inconsistent with its adopted plans and requires consultation and coordination.

The County's first response is that Ordinance 2011-013 downzones the rural area, resulting in less density overall. Therefore the City has no grounds for complaint as there will be less impact on public water supply, less demand for police and fire service, than previously planned. The County estimates that potential new lots in the Lake Whatcom watershed have been reduced from 63 to a maximum of 8.[283] The County asserts the Chuckanut area also was substantially downzoned, for a reduction of over 800 potential new lots.[284] The County contends the City's challenge is a collateral attack on the County's 2009 20-year CFP and should be dismissed as untimely.[285]

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[282] City Prehearing Brief at 24, 31

[283] County Response at 111, citing Staff memorandum, 4/5/11, Ex. R-007: The LAMIRDs remaining in the Lake Whatcom watershed are Sudden Valley and Blue Canyon. There is potential for only one additional lot in Sudden Valley, thus the ordinance results in 115 fewer potential lots in Sudden Valley. Blue Canyon LAMIRD includes a single .5 acre parcel, already developed with a small business that existed prior to 1990, and the ordinance does not change its size. The County contends neither Cain Lake nor Emerald Lake LAMIRDs are within the watershed. Ex. C-079E (COB watershed map).
Outside of the LAMIRDs, in the Lake Whatcom area, 91.1 acres in the watershed were down-zoned from R2A to R5A with the density overlay, allowing for 5 new lots instead of the 12 potential new lots previously allowed and 159.8 acres were down-zoned from RR2 to RR5A with the density overlay, allowing for 0 new lots instead of the 21 potential new lots previously allowed. Finally, in the South Bay area, 96.3 acres were down-zoned from RR1 to RR5A, allowing for 3 new lots instead of the 30 lots previously allowed resulting in a potential for a maximum of 8 new lots compared to the 63 lots previously allowed. [But note, County calculations are disputed by Hirst, Ex. C-003].

[284] Id. In the Chuckanut area, 772 acres were down-zoned. 535.6 acres were down-zoned from RR2 to RR5A with the density overlay, 162.8 acres were down-zoned from RR2 and RR3 to RR5A, and 73.7 acres were down-zoned from R2A to R5A. This resulted in a reduction of over 800 potential new lots.

[285] The Board disagrees, but dismisses the challenge on other grounds. See, *City of Bothell et al v Snohomish County*, CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sept. 17, 2007), at 18 (pointing out that the City's challenge to the consistency of the County's transportation plan with its land use action was not a collateral attack on the TIP).

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Further, the County asserts the City has failed to identify the particular provisions in the Ordinance and explain how they are inconsistent with particular provisions of the City's capital facilities or transportation plans.

The Board notes that the County, with Ordinance 2011-013, has located LAMIRDs along specific arterials and established development densities and uses in various parts of the rural area. Whether the net densities were greater or less than in 2009, the City was entitled to bring its challenge under RCW 36.70A.100 or other provisions to address specific impacts and inconsistencies created by the Ordinance.

The City shows that Ordinance 2011-013 locates one or more LAMIRDs on each of nine major arterials into the City.[286] The City anticipates these LAMIRDs will generate traffic into the City: "Bellingham is the regional employment, shopping, entertainment, education, and medical center for the Whatcom region and many County residents drive into Bellingham each day."[287] The City asserts the County was required to work with the City to address traffic impacts of these LAMIRDs and ensure consistency with the City's transportation plan. The City cites RCW 36.70A.070(6)(vi) [288] which provides:

> The transportation element described in this subsection (6), the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems, and the ten-year investment program required by RCW 47.05.030 for the state, must be consistent.

The Board has defined consistency to mean "provisions are compatible with each other – they fit together properly. In other words, one provision may not thwart another."[289]

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[286] Ex. C-060J (No. 3)
[287] Ex. C-060, at 3
[288] RCW 36.70A.070(6)(a)(v) (not included in the City's issues or arguments) provides even more directly that a jurisdiction's transportation element must include: "Intergovernmental coordination efforts, including an assessment of the impacts of the transportation and *land use plan assumptions* on the transportation systems of adjacent jurisdictions."
[289] *Laurence Michael Invs., v Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order (Jan. 8, 1999), at 23; cited with approval, *Chevron USA Inc v Hearings Board*, 123 Wn App. 161, 167.

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While the Board concurs with Bellingham that the County's land use actions should not thwart the City's capital facilities or transportation plans, the Board finds the record devoid of factual support for the City's argument. A mere map with arrows on arterials does not meet the City's burden of proof concerning traffic impacts. Granted the County's final adoption process was hasty, the City at minimum could have identified intersections already at a low Level of Service (LOS) and estimated the additional traffic likely to be generated by specific commercial or residential LAMIRDs potentially impacting these intersections.

The City cites to *Shoreline, et al v Snohomish County.*[290] In that case, the City of Shoreline opposed Snohomish County's designation of an Urban Center on a peninsula accessed only through Shoreline's city streets. The Board ruled Snohomish County violated the "coordination and consistency" requirement of RCW 36.70A.100 because the County's land use action rendered Shoreline's transportation and capital facilities plans non-compliant.[291] Shoreline transportation officials submitted a traffic analysis estimating (a) the peak trips from the peninsula if developed as allowed by the county, (b) the resulting LOS at key intersections in the city, and (c) the likely cost of mitigation measures. While the project proponent criticized the back-of-the-envelope quality of the city's study, the Board found it provided sufficient evidence to show the County's land use designation would thwart the City's transportation plan.[292]

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[290] *Shoreline et al v Snohomish County*, Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order (May 17, 2011), at 33-37.

[291] Id. at 36: "The Board concludes that the requirement for inter-jurisdictional coordination and consistency in RCW 36.70A.100 does not require Snohomish County to adopt land use designations or zoning regulations in the unincorporated UGA that are the same as or approved by an adjacent municipality. … Here, substantial evidence in the record demonstrates the Point Wells Urban Center redesignation makes Shoreline's plan non-compliant with the GMA, as Shoreline has no plans or funding for the necessary road projects to maintain the level of service standards which it has adopted pursuant to GMA mandates."

[292] Id.: "The lack of compatibility is clearly demonstrated in Shoreline's scramble to re-analyze the traffic and safety capacity of its impacted roadways and to estimate costs for necessary improvements."

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In the present case, by contrast, the Board has been presented with no information to make a determination of inconsistency between Bellingham's transportation and capital facilities plans for service within the City and the County's land use actions contained in Ordinance 2011-013. The City legitimately complains that this analysis, in the first instance, was the County's responsibility, and, further, there was too little time between the County's release of its draft ordinance and final adoption for the City to provide a detailed traffic study. Nevertheless, the City's burden on appeal requires some reference to facts in the record, and the City presents none.[293] Therefore Bellingham's legal issues alleging inconsistency/lack of coordination with the City's transportation and capital facilities plans[294] must be dismissed.

Consult and Coordinate on Services for Rural Areas[295]

RCW 36.70A.100 provides:

> The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties and cities with which the county or city, has, in part, common borders or related regional issues.

The applicable Whatcom County Comprehensive Plan goals and policies provide:

> Goal 4H: Coordinate with non-county facility providers such as cities and special purpose districts to support the future land use pattern promoted by this plan.
>
> Policy 4H-1: Establish interagency planning mechanisms and interlocal agreements to assure coordinated and mutually supportive capital facility plans from special districts, cities, and other major non-county facility providers which are consistent with this and other chapters of the comprehensive plan.

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[293] In addition to the maps with arrows on arterials, the City submits a section of its transportation plan describing the method it uses for calculating street capacity and LOS.
[294] To the extent Bellingham's capital facilities and transportation elements address service provision outside the City, the Board takes up the issue in the following section.
[295] Bellingham Legal Issues 1a and 9d.

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> Policy 2EE-7**:** Ensure county coordination with service providers to determine if new or infill development will have necessary services. Require concurrent review of new development to ensure adequate levels of service at rural standards are available at the time of development.
>
> Policy 2EE-8: Public services and public facilities necessary for rural commercial and industrial uses shall be provided in a manner that does not permit low density sprawl. Uses may utilize urban services that previously have been made available to the site.

The City alleges that the County has failed to do adequate capital facilities planning and to coordinate with public service providers, particularly water providers, to ensure services for rural development under Ordinance 2011-13. The City argues this failure was contrary to the policies cited above. The City also contends the County has violated the GMA requirement to make capital and budget decisions consistent with comprehensive plans[296] and the GMA Planning Goal to ensure public services are available to serve planned development.[297]

At the outset, the County asserts its duty to "cooperate" or "consult" with the City in planning for services for rural development was satisfied by its provision of regular notices to the City throughout the County's Rural Element update process.[298] The County maintains that non-County facility providers were engaged early on in the process through a meeting on November 13, 2008 and continued to be notified throughout the process.[299] The County points out that the City was on the email list since the beginning of the update process and several staff members, including planning and public works staff, were notified regularly. Policy 4H-1 requires the establishment of mechanisms and interlocal agreements to assure coordinated "plans," not "planning," the County argues, and asserts the City has not demonstrated how the Rural Element resulted in a conflict with service provider plans.

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[296] RCW 36.70A.120
[297] RCW 36.70A.020(12).
[298] County Response, at 112.
[299] Exs. D-003, ¶ 43, p. 9, N-001.

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In determining whether plans of adjacent jurisdictions are coordinated, the Board may look to the record of inter-agency communication in adoption of the challenged plan provisions. In *SOS v City of Kent*,[300] the Board found the City had sought comment from adjoining jurisdictions on its urban separators policies and received specific comment from King County; no violation of RCW 36.70A.100 was shown. Likewise in *Kap II v City of Redmond*,[301] the record indicated the City of Redmond was working with King County transportation staff on a comprehensive corridor study and was involving the community beyond the city limits in its roadway extension planning process; the Board found the RCW 36.70A.100 requirement of coordination was satisfied.

The present matter, however, calls for the County to ensure service provision by third parties. The GMA requires a County, in the designation of LAMIRDs, to "address the ability to provide public facilities and services in a manner that does not permit low density sprawl."[302] When a County's land use plans rely on other agencies as providers of public services, those agency plans must be consulted.[303] The County should ascertain "that the service provider should have the capacity to make adequate service available to the area."[304]

Accordingly, Whatcom County's comprehensive plan policies call for more than mere notice and opportunity for comment: the County policies require the County to engage actively with service providers to ensure the availability of facilities and services consistent with land use plans. When it comes to provision of public services in rural areas, the County's Goal 4H is to "Coordinate with non-county facility providers such as cities and special purpose districts

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[300] CPSGMHB Case No. 04-3-0019, Final Decision and Order (Dec. 16, 2004), at 9-11.
[301] CPSGMHB Case No. 06-3-0026, Final Decision and Order (Apr. 5, 2007), at 11-12.
[302] RCW 36.70A.070(5)(d)(iv).
[303] See *Durland v San Juan County*, WWGMHB Case No. 00-2-0062c, Final Decision and Order (May7, 2001).
[304] *Suquamish Tribe et al v Kitsap County*, CPSGMHB Case No. 07-3-0019c, Final Decision and Order (Aug. 15, 2007), at 26

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to support the future land use pattern promoted by this plan." This requires, in Policy 4H-1, "Establish(ing) interagency planning mechanisms and interlocal agreements to *assure coordinated and mutually supportive capital facility plans* from special districts, cities, and other major non-county facility providers…" Policy 2EE-7 specifies "*Ensure county coordination with service providers* …" The Board finds merely including such providers on an email notice list does not satisfy the County's coordination requirements for service provision to the rural area.

Bellingham contends the County failed to consult and collaborate concerning service provision to rural areas regarding water supply, police services, fire services, parks and open spaces, and transportation.[305] The Board notes Bellingham's capital facilities and transportation elements (updated in 2006) contain projections of service needs not only within the City but also in the Bellingham UGA and in the Urban Fringe Subarea. The City wisely is thinking ahead about future service extensions or conversely, impact of unserved development at the City's doorstep.

The City argues that, while the County named the City among others as future sources of public water supply capable of meeting the needs of new development, it did so without coordinating with the City (or other water utilities using Bellingham water) and failed to do any capital facilities planning for water and sewer in its Comprehensive Plan.[306] The City of Bellingham provides water to Water District 2, Water District 7, and Whatcom County Water and Sewer District 10. The City also provides some or all the water used by a number of rural water associations, including Deer Creek Water Association.[307]

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[305] City Prehearing Brief at 20-26
[306] City Prehearing Brief at 21.
[307] Barbara Dykes Declaration, Attachment F – City of Bellingham CFP, at CF-6 to CF-8

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The City in 2006 repealed all City water service zones outside the City's UGA and provided that the City would not extend water and sewer outside the UGA.[308] Nevertheless, the County's Rural Element named the City and many of the water providers to whom the City supplies water as future sources of public water supply capable of meeting the needs of the proposed rural development.[309] The County was required by its own policies to coordinate with the City and other water purveyors to ensure water provision to areas of higher rural densities. The Board finds the County failed to comply with its own policies in adopting the Rural Element without ensuring this coordination with respect to water supply.

The City provides evidence, in the text of its 2006 Capital Facilities element, of the challenges in providing public safety services in Bellingham's UGA and the Urban Fringe area. Bellingham's CFP indicates rural fire districts, in particular, face difficulties in ensuring adequate volunteer staffing during the day to meet demands in rural areas that have been developed more intensively.[310] Similarly, high crime rates in some UGA and Urban Fringe areas demand more police resources and better response times than the County Sheriff's has available for the rural area. [311]

The Board finds the City's Brief and un-rebutted record submittals document that County Fire Districts have not resolved the difficulties of coordinating, staffing and funding fire services in the rural area.[312] The Board finds the County failed to comply with its own policies in adopting the Rural Element without ensuring this coordination of fire services.

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[308] Exhibit C-060A at 1.14
[309] See LAMIRD Report
[310] Dykes Declaration, Attachment F – City of Bellingham CFP, at CF-27
[311] Dykes Declaration, Attachment F – City of Bellingham CFP, at CF-37
[312] Ex. C-60, at 4: "In general, the fire districts surrounding Bellingham have been struggling to assemble enough personnel to respond to the ever growing number of significant emergency events, especially during the daylight hours when most volunteers are out of the district working. This has become an acute problem… With increased growth in the periphery of the city just outside the city limits, this problem will intensify."

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However, the City points to no current factual support in the record for the City's purported concern over lack of coordination of law enforcement services.[313]

With respect to parks and open space, the City indicates it has established an LOS standard for parks which may be exceeded if people in areas of increased density on the urban fringe look to the City parks for their open space.[314] As the City is not a parks service provider to the unincorporated area, the Board does not find this argument germane. The City's concerns about transportation service coordination fail for the same reason.

Other Grounds for Challenge

As to the City's claim that the County is not making capital budget decisions in conformity with its comprehensive plan in violation of RCW 36.70A.120, or has failed to comply with RCW 36.70A.150, the Board does not find the City's arguments persuasive.

RCW 36.70A.120 provides:

> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

The City argues, "If [the County] has failed to consider the capital facilities consequences of a land use action, then the County is not making capital budget decisions in conformity with its comprehensive plan."[315] The Board declines to stretch the plain meaning of Section .120, which addresses "activities" and "decisions," to include inaction, as alleged by the City here. Besides, the City has provided no example of capital decisions or activities by the County that are contrary to the new Rural Element. In sum, failure to update a capital facilities plan

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[313] The City provides no further record that the crime rates indicated in the City's 2006 CPF are a continued problem, and the allegations about police services in the City's opening brief appear to the Board to be speculation (increased traffic on City streets will reduce police response time). See Ex. C-60, at 4.
[314] City Brief, at 22
[315] City Prehearing Brief at 26.

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consistent with the land use amendments may violate RCW 36.70A.070(3), but is not by itself a violation of RCW 36.70A.120.

As to the City's reliance on RCW 36.70A.150 – Lands Useful for Public Purposes -,[316] the Board notes this provision is not included in Bellingham's legal issues 1, 8, or 9. The issue will therefore not be addressed.

Bellingham also asserts the County's actions violate Goal 12 of the Act.

RCW 36.70A.020(12) provides:

> Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

The Board notes the County has had a concurrency ordinance in effect since 1998 to satisfy Goal 12 - WCC 20.80.212. However, the requirement to ensure adequate public facilities begins with capital facilities and transportation plans. The Board finds the County's failure to coordinate with service providers, in particular for water supply and fire protection services, frustrates Planning Goal 12.

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[316] RCW 36.70A.150 provides:

> Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify lands useful for public purposes such as utility corridors, transportation corridors, landfills, sewage treatment facilities, storm water management facilities, recreation, schools, and other public uses. The county shall work with the state and the cities within its borders to identify areas of shared need for public facilities. The jurisdictions within a county shall prepare a prioritized list of lands necessary for the identified public uses including an estimated date by which the acquisition will be needed. The respective capital facilities acquisition budgets for each jurisdiction shall reflect the jointly agreed upon priorities and time schedule.

Neither party here provides any information as to whether this inventory has ever been done. Compare, *Sky Valley v. Snohomish County* CPSGMHB Case No. 95-3-0068c, Final Decision and Order (March 12, 1996), at 61-62; *Pirie v. City of Lynnwood,* CPSGMHB Case No. 06-3-0029, Final Decision and Order (Apr. 9, 2007), at 32.

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Conclusion: The Board finds and concludes the City of Bellingham failed to carry its burden in alleging internal inconsistency, external inconsistency, and lack of required coordination with service providers except in the following respects:

The County's action in failing to consult and coordinate with the City and other service providers with respect to water service and fire protection services required by the new rural land use provisions was clearly erroneous. Thus the County failed to comply with RCW 36.70A.100, acted inconsistently with its Comprehensive Plan Goals and Policies in violation of RCW 36.70A.070 (preamble), and was not guided by GMA Planning Goal 12.

K. Lake Whatcom Watershed Protection

The City of Bellingham's Issues 3b, 3c, 6 (*WCC 20.36.252 Rural Residential Overlay),* 8b and c, 9b and 9f, and Hirst Issues 5 and 6 raise overlapping issues of protection of Lake Whatcom water quality. The Board addresses these issues as a group to avoid repetition of the relevant facts.

Bellingham Issue 3: *Did the amendments redesignating and rezoning the rural area violate GMA's requirements under RCW 36.70A.020(1), .020(2), .020(10), .020(12), .040, .070 (preamble), .070(3), .070(5)(a –d), .070(6), .110(1), .120*[317]*, because the amendments, among other things, failed to protect rural character and the environment, including groundwater resources, including but not limited to the rural areas listed as follows:*

b. Lake Whatcom/Rural Residential Density Overlay
c. South Bay/ Rural Residential Density Overlay

Bellingham Issue 6: *Did the amendments to the Whatcom County Zoning Code violate GMA's requirements for implementing development regulations under RCW 36.70A.040, and .070(preamble) and .070(5), .100(1), and .120, including but not limited to the following zoning code amendments:*

WCC 20.36.252 Rural Residential Overlay

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[317] In its Prehearing Brief the City fails to cite any of these sections of the GMA or explain how they are violated by the County density overlay. Instead it "incorporates by reference" the discussion in Issue 2 which pertains to LAMIRDs. As noted previously, the City fails to carry its burden on this issue.

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Bellingham Issue 8: *Did the amendments violate the internal consistency requirements of GMA, RCW 36.70A.070(preamble), .070(6) and .120 because:*

b.The County amended Comprehensive Plan Policy 2MM-10, a new policy for locating public facilities/services in the Lake Whatcom watershed, which creates an inconsistency with other plan policies because it encourages new public facilities in an environmentally sensitive rural area which will increase impervious surfaces.

c. *The County added new Comprehensive Plan policies and text, amended the Comprehensive Plan and Zoning Maps, and otherwise adopted rural zoning changes in the Lake Whatcom watershed that cumulatively are inconsistent with comprehensive plan policies protecting the watershed*.[318]

Bellingham Issue 9: *Did the amendments violate RCW 36.70A.020(12), .040(3) and .120, which require that: (a) implementing development regulations be consistent with comprehensive plan policies; (b) infrastructure be in place at the time of development; and (c) planning decisions be consistent with budget decisions and adopted capital facility plans, because the amendments allow development that is inconsistent with adopted utility and capital facilities plans and the amendments are otherwise inconsistent with the following policies of the Whatcom County Comprehensive Plan:*

f. Goal 2MM, Policies 2MM-1 and 2MM-6

Hirst Issue 6: *Did the County's adoption of the Ordinance, Sections 1, 2 and 3, fail to comply with RCW 36.70A.070(1), relating to drainage, flooding, and storm water run-off, RCW 36.70A.070(5), requiring the protection of critical areas and surface and groundwater resources, RCW 36.70A.060(3), requiring consistency review of critical area designations and development regulations, RCW 36.70A.480(1), RCW 36.70A.020 (Goals (8), (9), (10) and (14)), RCW 36.70A.130(1), requiring that development regulations be consistent with and implement the Comprehensive Plan, and RCW 36.70A.070 (preamble), requiring internal consistency, because the enactments fail to protect critical areas, wildlife habitat, surface and groundwater quality and shorelines from increased development in Rural areas?*

Express provisions in the GMA require planning and development regulations for the rural area to be protective of water resources. The GMA requires a county comprehensive plan to contain a Rural Element. The County may establish the rural character of the area. RCW 36.70A.030(15) defines rural character, providing in relevant part:

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[318] The Board found no discussion in the City's Prehearing Brief pertaining to Issue 8c of its PFR and this issue is deemed abandoned.

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> "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:…
> (g) that are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.

RCW 36.70A.070(5)(c) requires that the Rural Element include measures governing rural development:

> Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by: …
> (iv) Protecting … surface water and groundwater resources.

RCW 36.70A.070(5)(a) requires a county, if it considers local circumstances in developing its rural element, to "explain how the rural element harmonizes the planning goals in RCW 36.70A.020…" Planning Goal 10 (RCW 36.70A.020(10)) encompasses water protection:

> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.070(preamble) requires consistency in comprehensive plan provisions: "The plan shall be an internally consistent document…" RCW 36.70A.040(3)(d) requires the adoption of "development regulations that are consistent with and implement the comprehensive plan…"

Discussion

Lake Whatcom is the source water for Bellingham's water supply. Bellingham supplies water to 100,000 people, directly or purveyed to other water districts or associations.[319] The County Comprehensive Plan Rural Element contains a section titled "Lake Whatcom Study Area" that recounts joint efforts between the County, City of Bellingham, and Water District 10, dating from 1992, to reduce pollution loading to the Lake. These efforts have somewhat

[319] Ex. C-060C, TMDL Plan, at 29

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reduced the rate of increasing pollution but are not sufficient.[320] The most recent monitoring data for Lake Whatcom shows that water quality continues to decline.[321]

The record in this case provides overwhelming evidence that the primary threat to Lake Whatcom water quality is caused by phosphorus-laden runoff resulting from development in the watershed. For over 8 years Whatcom County has had a moratorium on development in the watershed on parcels less than 5 acres – a moratorium renewed 17 times at 6-month intervals. The most recent renewal, under Ordinance 2011-027 enacted July 12, 2011, contains the following finding: "Without a moratorium additional development lots may be created within the Lake Whatcom watershed that could lead to negative hydrologic and storm water impacts that may cause irreversible harm to Lake Whatcom and therefore cause harm to the health and welfare of the public."[322]

A 2007 report commissioned by the City to look at necessary measures emphasized controls on development to reduce runoff and resulting phosphorus loading, including:[323]

- Acquire all remaining buildable lots in Sudden Valley.
- Consider zoning changes to reduce development potential.
- Consider changes to current zoning and other policies that limit new sources of pollutants.

In March 2008, CH2MHill provided Whatcom County with a Lake Whatcom Stormwater Management Plan. The plan recommends the County adopt stringent development standards within the entire Lake Whatcom watershed, especially ensuring that developments platted prior to 2002 are no longer "grandfathered" into exemptions from best

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[320] Ecology Publication 11-11-068 (March 2011) *Focus on Lake Whatcom*, at 3: "The TMDL process is not the right tool to produce results quickly enough to counter the ongoing decline in Lake Whatcom's water quality." Dykes Decl. Ex. A.

[321] Ex. C-060I *Lake Whatcom Monitoring Project 2009/2010 Final Report* (Dr. Robin Matthews, et al) (March, 2011); see also Ex. C-079C

[322] County Brief, Appendix A

[323] City Brief at 7, citing *2007 Lake Whatcom Source Protection Plan*, CH2MHill (Nov. 2007), at 6-8 to 6-9, Dykes Decl. Ex. C

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practices in stormwater retention.[324] Later that same year, Ecology released the TMDL study for Lake Whatcom. The study determined, based on modeling analysis, that reducing phosphorus levels to restore dissolved oxygen levels would require

> "[T]he equivalent of 85.5% fewer acres of 2003 development, or 94.6% fewer acres than the total development allowed under 2003 zoning."[325]

In the face of this turn-back-the-clock imperative, in January 2011 Bellingham filed a petition with Ecology to close the watershed to new wells.[326] In denying the petition, the Department of Ecology acknowledged: "Water quality problems in Lake Whatcom have reached a critical threshold due to phosphorus-laden runoff from land development."[327] Ecology noted: "Algae growth is getting so excessive that in the summer of 2009, it clogged the filters at the city of Bellingham's water treatment plant for weeks, forcing the city to require restrictions on water use for the first time." Ecology noted the watershed contains about 500 undeveloped lots in the unincorporated County, most of which would depend on groundwater to be developed. However, Ecology indicated amendments to the County's development regulations, adopting practices that ensure no increase in phosphorus, would better protect the lake's water quality from further degradation by future development.[328]

Ecology indicated it was relying on a commitment from Whatcom County Executive Pete Kremen to adopt regulations by close of 2011 to ensure new development does not discharge any more phosphorus than a forested or native vegetated site.[329] Two methods are suggested: limitations on impervious surfaces and preservation of native vegetation, or,

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[324] City Brief at 8, citing *Final Lake Whatcom Comprehensive Stormwater Plan*, CH2MHill (March 2008) at 7-9 to 7-10, recommending regulations "requiring zero stormwater discharge from all new development. For areas outside the urban growth area, a minimum of 65% forest retention and less than 10% total impervious surface in new development should be required." Dykes Decl. Ex. B.
[325] Ex. C-060C, at 13
[326] Ex. C-048A, City of Bellingham Petition and Attached Findings.
[327] Ecology Publication 11-11-068, (March 2011) *Focus on Lake Whatcom* Dykes Decl. Ex. A.
[328] *Id.*; see Ex. C-060I, Executive Summary
[329] Ex. C-048C; Ex. C-001; see also, Ecology Publication 11-11-070 -*Frequently Asked Questions on Ecology's Petition Response* (March 2011)

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on smaller lots, a combination of rainwater storage, infiltration, water reuse, and treatment of discharged water.[330] The County has not adopted development regulations that meet this standard; the County Council in adopting Ordinance 2011-013 estimated adoption no sooner than June, 2012.[331]

The County's adoption of the Rural Element amendments for the Lake Whatcom watershed areas was vigorously opposed by both the City and Ecology in the public process prior to passage of the Ordinance, based on the proven impacts to water quality from even small increments of new development unmitigated by the more stringent stormwater regulations.

At the outset, the Board notes Bellingham has abandoned Legal Issue 8c and failed to effectively brief a legal basis for its Legal Issue 3. Effectively, Bellingham's argument is limited to whether the Rural Residential Density Overlay as applied in the Lake Whatcom area includes the required measures to protect surface water and groundwater resources (Bellingham Issue 6) and whether the County's action is internally consistent with various identified County policies and regulations (Bellingham Issues 8b and 9f).

With regard to legal issue 6, Bellingham contends: "The overriding requirement of RCW 36.70A.070(5)(c) is that the County include measures that apply to rural development to protect rural character," specifically including protecting surface water and groundwater resources. [332] The City argues that the Rural Residential Overlay, as applied in South Bay and Lake Whatcom, allows small lot development in areas where protection of surface water resources is of a high order of importance.[333] The problems created by small-lot development in the Lake Whatcom watershed are well-documented in the record, the City asserts: "Adding even the possibility of a few more one-acre lots in the watershed is

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[330] Id at 2
[331] Ex. C-100 Department of Ecology (May 10, 2011). See also Ex. M-002, Whatcom County Council colloquy 4/26/2011, at 9-10, estimating action on this item no sooner than June 2012.
[332] City Brief at 47.
[333] City Brief at 52-53

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detrimental to the City's water reservoir and adds more harmful phosphorus loading. It should not be forgotten that there are still many existing vacant lots in the watershed."

Hirst's Legal Issue 6 alleges the County's action lacks measures to protect surface and groundwater resources as required by RCW 36.70A.070(5)(c).[334] Hirst argues the Rural Element "must include actual requirements" to protect clean water, not "mere platitudes" such as the County's Policy 2DD-2 "Protect and value clean water and air."[335] Hirst cites the Department of Ecology's testimony on the impacts of the RRDO and the RR5 development provisions:[336]

> The Department of Ecology testified that the County's rural density overlay was a "mistake because mitigating stormwater on lots of two acres and less has not been successful under current regulations." Ecology further testified that regulations doubling impervious surfaces would have adverse effects on water quality under existing regulations.

Steve Hood testified before County Council:

> Finally, we would like to address the matter of the RR-5 Zone. We wondered what the effect of rezoning to RR-5 instead of R-5A would be. We were distressed to discover it would allow doubling the area that could be covered with impervious surface. Under WCC 20.71.302, R zones are limited to 10% impervious surface but RR zones are allowed 20%. The easiest way to meet the phosphorus targets is to have no more than 10% of a site as impervious surface and to disperse it into a forest area that covers 65% of the site. To set a new zoning class that allows higher impervious area seems to conflict with the goals Whatcom County and Ecology are working together to achieve for Lake Whatcom.[337]

WCC 20.71.302 provides:

> Impervious surface requirements shall be as follows;

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[334] Hirst Prehearing Brief, at 61-65. Hirst's Legal Issue 6 alleges a violation of Goal 10, but the Prehearing Brief does not reference Goal 10
[335] Id at 62.
[336] Id at 63, citing Ex. C-001
[337] Ex. C-001

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(1) For uses in the UR, URM, and RR Zone Districts, at least 80 percent of the lot or parcel shall be kept free of structures and impervious surfaces.

(2) For uses in the R Zone District, at least 90 percent of the lot or parcel shall be kept free of structures and impervious surfaces.

The County has a two-fold response: first, Ordinance 2011-013 is a significant downzone which will be more protective of the watershed;[338] second, only a handful of lots in the Lake Whatcom watershed are likely to be created by the RRDO, so no negative impact on water quality can be demonstrated. Hirst in reply[339] points out that the Staff memorandum in fact estimates the proposed RRDO in the Lake Whatcom area would allow 17 new lots, not 8, as the County's brief reports.[340] Hirst points out they provided the County Council a GIS analysis using the County's data and determined the RRDO in the Lake Whatcom R2A zones alone would allow 25 additional lots.[341]

The County does not address the issue of the doubled allowance for impervious surface.

The Board addresses the internal consistency question first, then the requirement for "measures."

Internal Consistency

The Comprehensive Plan recognizes the importance of Lake Whatcom as the region's primary urban water supply and the challenges to protecting the Lake's water quality. [342] The CP Special Study Area subchapter on Lake Whatcom provides:

> Goal 2MM: Prioritize the Lake Whatcom area as an area to minimize development, repair existing storm water problems, specifically for phosphorus,

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[338] See Ex. R-007, Staff memorandum (4/5/11)
[339] Hirst Reply Brief at 57
[340] Ex. R-007 at 2 ("PDS estimates the proposed rezoning would reduce the potential of new lots in these areas from 72 to 17") and 3 (chart showing "Potential New Lots" under "Proposed" zoning is 17).
[341] Ex. C-003, p. 5
[342] CP at 17-20

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and ensure forestry practices do not negatively impact water quality. Provide sufficient funding and support to be successful.

Policy 2MM-1: Work with property owners to find acceptable development solutions at lower overall densities than the present zoning allows.

Policy 2MM-6: Do not allow density bonuses within the watershed.

The City argues the County's application of the RRDO is a density bonus contrary to Policy 2MM-6, is contrary to the 2MM-1 policy of helping landowners to find *lower-density solutions*, and violates Goal 2MM's prioritization of the watershed as an area to minimize development.[343]

Whether or not the RRDO is technically a density bonus, the Board agrees that on its face the RRDO is designed to provide qualifying property owners with a *higher-density solution* than the underlying zoning, contrary to Policy 2MM-1. As to Goal 2-MM to minimize development in the watershed, the Board does not find the County's "down-zoning" argument persuasive here.

The Board reads the record concerning efforts to reduce phosphorus loading in Lake Whatcom to establish a common understanding that *any* incremental development in the watershed, without surface water controls, is likely to increase water-quality degradation. Therefore the baseline for "minimizing development" is not the prior zoning but rather is the existing condition.[344]

Further, the County has had in place for over 7 years a moratorium keeping the minimum rural lot size in the watershed at 5 acres. The Board has previously found 6 years of extended moratoria to constitute a "development regulation" rather than an "interim control"

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[343] City Brief at 67. The County does not respond to this issue. See City Reply Brief at 37-39

[344] As Ecology points out, minimizing creation of new lots solves only part of the problem, as there are 500 already-platted lots where development could be "minimized."

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under GMA.[345] Thus if prior zoning is the appropriate comparison, the County's 5-acre zoning is the benchmark, not the zoning adopted in 2005 and found to be noncompliant. The County's adoption of Ordinance 2011-013, by including the RRDO, does not "minimize development" in comparison with 5-acre zoning.

Conclusion: The Board concludes application of the RRDO to areas in the Lake Whatcom watershed is inconsistent with the Goal 2MM and Policy 2MM-1.

Bellingham also challenges the County's newly adopted Plan Policy 2MM-10, which states:

> Encourage the location of public services such as schools, libraries, and post offices, within rural communities that would likely reduce the vehicle miles traveled within the watershed.

The City argues that the construction of such facilities encourages construction in the rural watershed and that the installation of impervious surfaces associated with this construction will increase stormwater runoff and phosphorous loading in the watershed.[346] The County responds that the City's own strategies to protect its water source call for reducing vehicle traffic and resulting road runoff along Lake Whatcom. The County asserts locating public facilities in Sudden Valley to serve the local community is likely to reduce vehicle miles traveled.

While it argues that Policy 2MM-10 creates an internal inconsistency in the CP because it is in conflict with other plan policies, the City fails to identify those "other plan policies." Instead, the Board finds that this policy, encouraging new public services to develop within Rural Communities "that would likely reduce the vehicle miles in the watershed," is consistent with the City's own strategies to protect its water source. However, the Board

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[345] *Master Builders Association/Camwest v City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order (Aug. 4, 2005) ("the continuing moratorium is no longer an interim control but is a development regulation").
[346] City Brief at 63.

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finds, as indicated below, that the County must adopt "measures" to ensure zero-discharge of phosphorus in the construction and operation of such facilities.

Conclusion: The City has failed to demonstrate that Policy 2MM-10 creates an inconsistency with other plan policies.

Measures to Protect Surface and Groundwater Resources

Bellingham and Hirst contend Ordinance 2011-13 fails to comply with RCW 36.70A.070(c)(iv) because the Ordinance does not contain measures that apply to rural development in the Lake Whatcom watershed and protect surface and groundwater resources. The Board addressed this issue above in Section C and repeats here for emphasis. The Board noted the County Executive committed to Ecology that the County would enact stringent new controls on watershed development aimed at zero-discharge of phosphorus-laden runoff. Those controls have not been enacted. The development in the watershed made possible by Ordinance 2011-013 and by the County's lifting of its moratorium is not subject to any of the indicated controls.

In this case, the necessary measures to protect surface and groundwater resources in the Lake Whatcom area are clearly identified in the record. Department of Ecology's Steve Hood testified: "The easiest way to meet the phosphorus targets is to have no more than 10% of a site as impervious surface." Changing the Lake Whatcom RR-5A designations to R-5A would be an obvious first step. Making application of the RRDO in the Lake Whatcom area contingent on adoption of "more protective development standards" has been suggested. Comprehensive Plan commitment to a zero-discharge policy and expedited adoption of the necessary regulations is probably indicated.

Conclusion: The Board determines Petitioners Bellingham and Hirst have met their burden of proving the County's failure to provide the necessary measures to protect Lake Whatcom's water resources.

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L. Governors Point LAMIRD

Petitioner Governors Point Development Company (GPDC) challenges the County's exclusion of the Chuckanut area, including Governors Point, from LAMIRD designation. The Board has previously addressed GPDC's public participation issues. The remaining GPDC issues are discussed here.

Summary Description: The Chuckanut affected area, located on the southern limit of Bellingham's UGA. The affected area consists of about 775 acres along the Chuckanut Bay shoreline and SR 11 with no nonresidential uses. The City of Bellingham extended water lines into much of the area decades ago but presently does not allow new connections. The Chuckanut affected area is a rural area much of which has been developed with relatively small rural lot sizes over the years – about half were developed before 1990. The average parcel size in the portion currently zoned RR-2 is 1.3 acres and parcels range from 0.2 acres to 21 acres. Because of the variety of parcel sizes and development patterns in this area, RR-5A zoning with the Residential Rural Density overlay is proposed.

The portions of the Chuckanut area now zoned R-2A and RR-3 have not been developed to the same extent (average parcel sizes of 4.9 acres and 10.1 acres respectively) and zones of R-5A and RR-5A are proposed, with no density overlay. On several jointly-owned parcels on the Governor's Point peninsula a pending subdivision application for 141 lots is vested. A water line and a series of roads had been built across the parcels by 1990, but the residential subdivision was not developed, and additional infrastructure on the parcels is limited to a water line, electric line, and telephone line that serve a neighboring residence (a second water line serving a second neighboring residence is no longer in use).[347]

GPDC Issue 1: *Did the County's adoption of the Ordinance fail to comply with the GMA goal found in RCW 36.70A.020(5) when it failed to assess the economic impacts of*

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[347] Ex. R-001 at 80.

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excluding the Chuckanut area including Governors Point from a LAMIRD, designating it in the County Comprehensive Plan as Rural, and downzoning it to a low density, all of which are completely inconsistent with the current and historical development patterns, zoning, and densities of the area?

Discussion

The GMA's economic development goal RCW 36.70A.020(5) (Goal 5) requires the County to:

> "(e)ncourage economic development throughout the state that is consistent with the adopted comprehensive plans, promote economic opportunity for all citizens of the state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional difference impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

GPDC argues that the County violated the consistency requirements of the GMA's economic goal RCW 36.70A.020(5) because it failed to assess the economic impacts of excluding the Chuckanut area including Governors Point from a LAMIRD, designating it in the County's Comprehensive Plan as Rural, and downzoning it to a low density, which GPDC argues is inconsistent with the current and historical development patterns, zoning and densities of the area, and the Comprehensive Plan and Subarea Plan Economic Development Goals and Policies.[348]

GPDC contends that to downzone and re-designate Governors Point to rural densities is inconsistent with the long term planning for the area as well as its vested and stipulated rights, does not provide for predictability for desirable economic development as required by the Economic Development Goal of the Comprehensive Plan, and creates hurdles restricting effective and desirable economic development.

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[348] GPDC Brief at 35.

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In response, the County argues that if profitable development was the GMA's sole goal, no development regulation would survive. Instead it offers that the GMA adopted multiple, conflicting goals and the County has balanced them appropriately. Lastly, it points out that the economic goal does not require the County to create a LAMIRD.

In RCW 36.70A.3201 the Legislature found that:

> Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

There is no requirement that the County must show that it has weighed the GMA goals as part of every action it takes under the GMA. The GMA creates a presumption of validity in favor of local governmental actions and places the burden of proof on the petitioner to demonstrate that any action taken is not in compliance with the Act[349]. Petitioner has not raised any factual considerations that show a failure to comply with the cited goal. All that Petitioner has argued is that its property, which it acknowledges has vested development rights, has been rezoned, changing a prior designation it alleges has been in place for over twenty-five years and the County has chosen not to designate a LAMIRD in this area. Petitioner GPDC failed to carry its burden of proof to demonstrate that the County's action failed to be guided by Goal 5.

Conclusion: Petitioner GPDC has failed to carry its burden of proof to establish that the County's action failed to be guided by Goal 5.

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[349] RCW 36.70A.320

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GPDC Issue 2: *Did the County's adoption of the Ordinance fail to comply with RCW 36.70A.020(6) when it ignored GMA mandates and participated in arbitrary and discriminatory action in an attempt to prevent the future development of Governors Point?*

Discussion

GPDC argues that the County violated the private property rights goal of the GMA RCW 36.70A.020(6) because it arbitrarily and discriminatorily redesignated and downzoned the Chuckanut area in an attempt to prevent the future development of Governors Point. It suggests: "There can be no other reason for such inconsistent, illogical, and haphazard planning."[350] It notes that the Board determined that the term "arbitrary" connotes actions that are ill-conceived, unreasoned, or ill considered, while the term "discriminatory" involves actions that single out a particular person or class of persons for different treatment without a rational basis upon which to make segregation.[351]

Because GPDC concludes that the County's actions in downzoning and re-designating the Chuckanut area to a Rural density violated GMA requirements with regard to statutory internal consistency requirements, statutory consistency requirements regarding the County's development regulations, statutory public participation requirements, statutory and Comprehensive Plan LAMIRD criteria, the County's SMP, the Chuckanut Lake Samish Subarea Plan, and statutory economic goals, it concludes that the County's actions are illogical and arbitrary planning for the area. And because, as GPDC asserts, the County singled out the Chuckanut area and specifically Governors Point for different treatment by refusing to include both within a LAMIRD and without a rational basis upon which to make such segregation and by threatening to veto an Ordinance specifically if it included Governors Point, it concludes the County's action was discriminatory as well.

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[350] GPDC Brief at 37.
[351] Achen et al. v. Clark County, WWGMHB Case No. 95-2-0067, Final Decision and Order, p. 7 (Sept. 20, 1995).

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The County replies that while Goal 6 provides in part that "[t]he property rights of landowners shall be protected from arbitrary and discriminatory actions," it is important to consider the property right at risk.

This Board recently addressed this question in *Laurel Park Community LLC, et al, v. City of Tumwater*.[352] In that case, the Board quoted *Achen v. Clark County*[353] with approval:

> The term "property rights of landowners" could not have been intended by the Legislature to mean any of the penumbra of "rights" thought to exist by some, if not many, landowners in today's society. Such unrecognized "rights" as the right to divide portions of land for inheritance or financing, **or "rights" involving local government never having the ability to change zoning**, or "rights" to subdivide and develop land for maximum personal financial gain regardless of the cost to the general populace, are not included in the definition in this prong of Goal 6. Rather the "rights" intended by the Legislature could only have been those which are legally recognized, e.g., statutory, constitutional, and/or by court decision. (Emphasis added).

The Board concluded in that case that the City of Tumwater had not taken action affecting a defined property right and therefore the Board did not even reach the issue of whether the action was arbitrary and discriminatory.

In the present case, GPDC has not demonstrated that the County has taken action affecting a legally-recognized property right. The Board notes that the Governors Point property owner does not have a right to the continuation of existing zoning and certainly does not have a right to a LAMIRD designation.

Conclusion: Petitioner GPDC has failed to carry its burden of proof to establish that the County's action failed to be guided by Goal 6.

GPDC Issue 3: *Did the County's adoption of the Ordinance fail to comply with RCW 36.70A.030(15) and (16) and the internal consistency requirements of 36.70A.070 and*

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[352] WWGMHB No. 09-2-0010, Final Decision and Order (10/13/2009).
[353] WWGMHB Case No. 95-2-0067c, Final decision and Order (Sep. 20, 1995) at 7 (emphasis added).

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36.70A.040(4) when it excluded the Chuckanut area including Governors Point from a LAMIRD, downzoned the area from RR3 to RR5A, and assigned the area a Rural Comprehensive Plan designation, inconsistent with the realistic circumstances of the area, inconsistent with the GMA's definitions for "rural character" and "rural development", inconsistent with newly amended County Comprehensive Plan Goal 2JJ, and inconsistent with the County's zoning and designation of other similarly situated areas?

Discussion

GPDC argues that the County's decision to not include the Chuckanut area in a LAMIRD but rather to assign the area a Rural Comprehensive Plan designation violates the internal consistency requirements of the GMA because it is inconsistent with the character of the area; inconsistent with GMA's definitions of "rural character" and "rural development"; inconsistent with the Plan's goals and policies; and inconsistent with the County's zoning and designation of other similarly affected areas.[354]

GPDC argues that historical development patterns of the Chuckanut area have averaged approximately one unit per acre. As this Board has held in the past that the County's RR1 zone is not a rural density, it argues that it does not make sense to designate this area as Rural. Instead, GPDC argues that this area is more properly designated as a LAMIRD. GPDC argues that the inclusion of this area in the Residential Overlay, a designation for "areas within the Rural designation where smaller-lot rural development has already occurred"[355] demonstrates that the area has already been intensively developed. Instead, GPDC argues that the Chuckanut area is more similar to other areas that the County has designated as Type I LAMIRDs.

The County responds that there is no lack of internal consistency because, unlike the residential areas abutting Chuckanut Drive, Governor's Point is mostly undeveloped. The County points out that rural land includes property with greater density than one unit per five

[354] GPDCs' Brief at 6.
[355] Whatcom County Comprehensive Plan Policy 2GG-3

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acres. Finally, the County argues that the alleged lack of traditional rural density does not require the County to create a LAMIRD, but instead the GMA encourages counties to protect rural areas regardless of historical development.

GPDC is incorrect that the development pattern of the Chuckanut area, including Governors Point is *per se* inconsistent with rural character, thus creating an inconsistency. On this remand, the Board has held that contained areas of higher density do not pose a threat to rural character, but rather form a component of the variety of rural densities found in Whatcom County.[356] As noted elsewhere in this Order, the designation of a LAMIRD is an option available to counties, and such designation is vested to the County's discretion. The choice to not designate an area as a LAMIRD does not create an inconsistency.

Conclusion: GPDC has failed to demonstrate that the County violated RCW 36.70A.030(15) and (16) and the internal consistency requirements of 36.70A.070 and 36.70A.040(4) when it excluded the Chuckanut area including Governors Point from a LAMIRD, downzoned the area from RR3 to RR5A, and assigned the area a Rural Comprehensive Plan designation.

GPDC Issue 6: *Did the County's adoption of the Ordinance fail to comply with RCW 36.70A.070(5)(d) because the County failed to consider historic development patterns and certain vested and stipulated rights and failed to designate and include an obvious area of more intensive rural development (specifically, the Chuckanut area including Governors Point) within a LAMIRD as required of a jurisdiction planning under the GMA that chooses to designate LAMIRDs?*

GPDC Issue 7: *Did the County's adoption of the Ordinance fail to comply with RCW 36.70A.070(5)(d)(iv) and newly amended Whatcom County Comprehensive Plan Goal 2HH because it failed to consider the existing more intensively developed nature of the Chuckanut area when it chose to exclude the area from a LAMIRD and failed to consider other factors, including but not limited to: the logical outer boundary of the area as delineated by the built environment; the character of the existing natural neighborhood and*

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[356] *Futurewise v. Whatcom County*, WGMHB No. 05-2-0013, Order Following Remand (9/9/11).

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community; the physical boundaries of the area including Bellingham's city limits, the Skagit County line, Chuckanut Bay, and the Chuckanut Mountains; the prevention of abnormally irregular boundaries; and the existing public infrastructure?

GPDC Issue 8: *Did the County's adoption of the Ordinance fail to comply with RCW 36.70A.070(5)(d)(v) when it failed to consider the built environment (both above and below ground) as of 1990 in the Chuckanut area including Governors Point when it failed to designate the area as a LAMIRD, downzoned the area, and assigned the area a Rural Comprehensive Plan designation?*

Discussion

In its issues 6, 7 and 8 GPDC alleges that the County failed to designate and include the Chuckanut area including Governors Point within a Type I LAMIRD even though it was an area of more intensive rural development. It alleges the County failed to properly review and consider the logical outer boundaries of the Chuckanut area as delineated by its built environment; the character of its existing natural neighborhood and community; the physical boundaries of the area including Bellingham's city limits, the Skagit County line, Chuckanut Bay, and the Chuckanut Mountains; the prevention of abnormally irregular boundaries; the existing public infrastructure; historic development patterns; and certain vested and stipulated rights in violation of the provisions of RCW 36.70A.070(5)(d) and County Comprehensive Plan Goals and Policies.[357]

GPDC argues that, while the GMA gives a county discretion to establish LAMIRDs, once it has decided to designate LAMIRDs it is required to include all areas of more intensive rural development. It argues that the Governors Point area meets the necessary criteria for LAMIRD designation, based on the 1990 built environment.

This Board has previously held that "[I]t is not a violation of the GMA that there are areas that the County could have designated as LAMIRDs [local areas of more intense rural

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[357] GPDC's Brief at 19.

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development] but chose not to.*"* [358] LAMIRDs are a discretionary rather than mandatory designation. RCW 36.70A.070(5)(d) provides the "rural element *may allow* for limited areas of more intense rural development." Thus, a county does not violate the GMA, let alone commit clear error, by choosing not to create a LAMIRD. A county's decision not to create a LAMIRD complies with GMA's mandate to minimize and contain intensive rural development because a county prevents further intensification by holding future development at rural levels.

As to GPDC's argument that the County ignored vested rights, our State Supreme Court has specifically disavowed the Court of Appeal's *dicta* in *Gold Star* suggesting that vested rights must be considered when establishing LAMIRDs.[359]

The County demonstrated that it had sound reasons for not designating this area a LAMIRD, as described in its LAMIRD report:

> The portions of the Chuckanut area now zoned R-2A and RR-3 have not been developed to the same extent (average parcel sizes of 4.9 acres and 10.1 acres respectively) and zones of R-5A and RR-5A are proposed, with no density overlay. On several jointly-owned parcels on the Governor's Point peninsula a pending subdivision application for 141 lots is vested. A water line and a series of roads had been built across the parcels by 1990, but the residential subdivision was not developed, and additional infrastructure on the parcels is limited to a water line, electric line, and telephone line that serve a neighboring residence (a second water line serving a second neighboring residence is no longer in use).[360]

Further, as noted above in the section of this Order addressing GMA public participation challenges, the County fully considered GPDC's request for LAMIRD designation and responded to its concerns, albeit not to GPDC's satisfaction. The County also heard and

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[358] *Dry Creek Coalition v. Clallam County*, WWGMHB No. 07-2-0018c, Final Decision and Order, p. 17 (4/23/2008).
[359] *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723**,** 739 (2009).
[360] Ex. R-001, p. 80

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discussed "the hazards of Chuckanut Drive," traffic and access impacts, landslide hazards, and other aspects of LAMIRD designation for the area.[361]

The Board concludes that the County did not commit clear error by refusing to create a LAMIRD around Governors Point and the Chuckanut area and that instead, elected officials applied the correct standard under the GMA, exercised their political judgment and decided not to form a LAMIRD.

Conclusion: GPDC has failed to demonstrate that the County's adoption of the Ordinance failed to comply with RCW 36.70A.070(5)(d) by failing to consider historic development patterns; that it failed to comply with RCW 36.70A.070(5)(d)(iv) Comprehensive Plan Goal 2HH because it failed to consider the existing more intensively developed nature of the Chuckanut area; or that it failed to comply with RCW 36.70A.070(5)(d)(v) when it it failed to designate the area as a LAMIRD.

GPDC Issue 9: *Did the County's adoption of the Ordinance fail to comply with RCW 36.70A.020; 36.70A.040; 36.70A.480(1); the internal consistency requirements of 36.70A.070; and newly amended Whatcom County Comprehensive Plan Goals 2HH and 2JJ when it failed to ensure that the amended Comprehensive Plan designation of the intensively developed Chuckanut area including Governors Point as "Rural" was consistent with the 2008 Whatcom County SMP development regulations, WCC 23.30.02.2, 23.30.06.2, and 23.30.07?*

Discussion

GPDC argues that the County failed to comply with RCW 36.70A.020, 36.70A.040, 36.70A.480(1), and Whatcom County Comprehensive Plan Goals and Policies, because the County did not ensure that the amended Comprehensive Plan designation of the intensively developed Chuckanut area including Governors Point as "Rural" is consistent with the 2008 Whatcom County SMP development regulations, WCC 23.30.02, 23.30.06, and 23.30.07. It alleges that the County's adoption of the Ordinance results in the Chuckanut area having an

[361] See Ex. M-103, M-011, M-010

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inconsistent Comprehensive Plan designation (Residential Rural) with the designation of the area by the County's Shoreline Management Program (SMP) as Shoreline Residential.[362] That is, areas designated as Shoreline Residential by the County's SMP which are characterized by higher density development of approximately one unit per acre are inappropriate for and contradictory to an area designated by the County's Comp Plan as Rural.

The County argues, and the Board agrees, that merely because an area is designated as Shoreline Residential in the SMP does not mean that it cannot be designated as Rural in the CP and that these designations do not conflict. The County SMP attaches a designation to all property subject to the Shoreline Management Act:

> *For the purposes of this program*, jurisdictional shorelines are divided into segments and reaches. Each segment is assigned one or more shoreline area designations pursuant to this chapter in order to provide for the management of use and development within shorelines. (emphasis added)

WCC 23.30.010. Therefore SMP does not conflict with the Plan and it certainly does not compel the establishment of LAMIRDs.

Conclusion: GPDC has failed to carry its burden of proof to demonstrate that the County's adoption of the Ordinance failed to comply with RCW 36.70A.020; 36.70A.040; 36.70A.480(1); and the internal consistency requirements of 36.70A.070.

GPDC Issue 10: *Did the County's adoption of the Ordinance fail to comply with the internal consistency requirements of RCW 36.70A.070 and 36.70A.040(4) and County Comprehensive Plan goal 2L when it failed to ensure that the revised Comprehensive Plan designation and zoning of the Chuckanut area including Governors Point were consistent with the current Chuckanut-Lake Samish subarea plan?*

Discussion

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[362] GPDC Brief at 28.

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GPDC argues that the County did not ensure that the revised Comprehensive Plan designation and zoning of the Chuckanut area including Governors Point were consistent with the current Chuckanut Lake Samish Subarea Plan.[363] It notes that the Chuckanut Lake Samish Subarea Plan (Subarea Plan) is a component of the Whatcom County Comprehensive Plan and was adopted in 1986 pursuant to RCW 36.70.320 prior to the passage of the Growth Management Act. The Subarea Plan governs the Chuckanut area including Governors Point which the County, in the adoption of the Ordinance, downzoned and re-designated from Suburban Enclave to Residential Rural. GPDC notes that the County's LAMIRD Report explicitly recognizes the Chuckanut Lake Samish Subarea Plan as the Land Use Plan governing the area and contains language devoted to ensuring the densities of the Chuckanut area remain consistent. The Comprehensive Plan designates the Chuckanut area as Rural, while the Chuckanut Lake Samish Subarea Plan assigns the Chuckanut area a land use designation of Residential.

The Subarea Plan provides:

> It is the policy of Whatcom County to maintain the character of existing low density residential areas by designating certain portions of the Chuckanut-Lake Samish Subareas as RESIDENTIAL RURAL. To implement this policy, residential densities of either one dwelling unit per acre or two dwelling units per acre shall be provided.[364]

Next GPDC argues that the Chuckanut Lake Samish Subarea Plan is inconsistent with the County's development regulations/zoning of the Chuckanut area, because the Chuckanut Lake Samish Subarea Plan explicitly calls for densities higher than the five units per acre to which the County downzoned the Chuckanut area from its historical RR2 and RR3 zoning.

As the County notes, under Policy 2L-2, "in the event there is an inconsistency between a Subarea Plan and the Whatcom County Comprehensive Plan, the Whatcom County

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[363] GPDC Brief at 30.
[364] Appendix A, Chuckanut Lake Samish Subarea Plan, Chapter V, Land Use Designations, at section 2.01, p. 32. (emphasis in original).

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Comprehensive Plan shall prevail."[365] The policy also outlines the process for making subarea plans consistent with the Comprehensive Plan. In response to GPDC's claims that this reconciliation provision violates the GMA, relying on *Stalheim, et al v. Whatcom County*,[366] the County argues that the Stalheim ruling is inapplicable here. In the Stalheim case, the County used a reconciliation policy to address public facilities and service gaps identified in the UGA review process. The Board's decision in that case was based on its conclusion that necessary elements of the capital facilities plan required by the GMA were missing and that the reconciliation policy did not satisfy that deficiency. The County states it is not relying on this policy in lieu of fulfilling some requirement under the GMA and nothing in the Act prevents the County from adopting a comprehensive plan and then bringing subarea plans into compliance later.

The Board does not find an internal inconsistency between the County's Comprehensive Plan and the Chuckanut Lake Samish Subarea Plan's designation of this area. The GMA requirement for internal consistency means that the planning policies and regulations must not make it impossible to carry out one provision of a plan or regulation and also carry out the others. Policy 2L-2 addresses how potential conflicts between the Comprehensive Plan and subarea plans are to be addressed – the Comprehensive Plan controls.

Conclusion: GPDC has failed to demonstrate that the County failed to comply with the internal consistency requirements of RCW 36.70A.070 and 36.70A.040(4) and County Comprehensive Plan Goal 2L by failing to ensure that the revised Comprehensive Plan designation and zoning of the Chuckanut area including Governors Point were consistent with the current Chuckanut-Lake Samish Subarea Plan.

M. Invalidity

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[365] Ex. D-003, Exhibit A, p. 3-5.
[366] WWGMHB Case No. 10-2-0016c, Final Decision and Order (4/11/11).

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Discussion

A finding of invalidity may be entered when a board makes a finding of noncompliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1) (in pertinent part).

We have held that invalidity should be imposed if continued validity of the noncompliant comprehensive plan provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning.[367] Under this analysis, a finding of invalidity has been imposed where there is a serious risk of significant inconsistent development vesting before the date on which the local jurisdiction is expected to achieve compliance.

In this case, invalidity is warranted with regard to the amended provisions of the County's development regulations that permit development in Type I LAMIRDs without regard to the character of the existing area in terms of size, scale, use and intensity that was found within the LAMIRD on July 1, 1990, as required by the GMA. Further, the County fails to properly ensure that its Type III LAMIRDs are "isolated" as required by the Act. The Board finds WCC 20.59.322 allows buildings over three times larger than any 1990 buildings in the Rural General Commercial (RGC); that the required measures to control and contain rural development and protect rural character are absent from the Neighborhood Commercial Center (NC) District (20.60 WCC), except for a narrow 25 foot wide buffer for agriculture zones; that RCW 36.70A.070(5)(d)(iii) limits uses to those that are "small scale", yet the 35,000 sq. ft. limit for buildings in a Rural Business designation in Small Town Commercial (STC) District, WCC 20.61.322, is not small scale and is out of scale with the rural area and far larger than any building that existed in 1990; that the Rural Tourism Descriptor and TC

[367] See *Butler v. Lewis County,* WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing Invalidity, February 13, 2004).

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District 20.63 WCC contains no limit on building size, the number of buildings or the size of a Type II LAMIRD, thus failing to ensure that the uses are small-scale; that the 20,000 sq. ft. area limit in WCC 20.67.301 General Manufacturing (GM) District is over 4,000 sq. ft. larger than any 1990 buildings of similar designation, thus violating RCW 36.70A.070(5)(d)(i)'s limits on allowed building sizes; that the 22,000 sq. ft. area limit in Rural Industrial-Manufacturing (RIM) District, WCC 20.69.301 is over 6,000 sq. ft. larger than any 1990 buildings of similar designation, and the allowable uses in the RIM are beyond the scale and intensity in 1990, thus violating RCW 36.70A.070(5)(d)(i)'s limits on allowed building sizes and the intensification of uses.

The Board further finds that the designation or Logical Outer Boundary of the following LAMIRDs was not in accordance with RCW 36.70A.070(5) (d)(iv): Birch Bay Lynden Valley View (as to one parcel), Eliza Island, those areas between the nodes of 1990 development at Smith and Axton Roads of the Smith & Guide Meridian LAMIRD LOB, and that property within the Van Wyck LAMIRD which was vacant in 1990 except for the presence of a water meter, those properties south of the lake in the Emerald Lake LAMIRD which had yet to be developed in 1990. The Board concludes that the creation of the Fort Bellingham/Marietta and North Bellingham LAMIRDs adjacent to a UGA was clearly erroneous.

To allow these code provisions and LOBs to remain viable during the remand phase of this appeal would permit uses to vest in the LAMIRDs and create patterns of development wholly inconsistent with the existing areas as of July 1, 1990. The Board finds that, if permitted, such development would substantially interfere with Goal 1 of the GMA, by encouraging urban levels of development *outside* urban areas and Goal 2, by encouraging sprawl.

Conclusion: The Board concludes that the continued validity of the amended portions of WCC 20.59, 20.60, 20.61, 20.67 and 20.69 and the LOBs of certain LAMIRDs described

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above would substantially interfere with Goal 1 of the GMA and therefore finds them to be invalid.

VI. ORDER

Based on the foregoing the County is ordered to bring its Comprehensive Plan and associated Development Regulations into compliance with the Growth Management Act.

The following schedule for compliance, briefing and hearing shall apply:

Item	Date Due
Compliance Due on identified areas of noncompliance	July 10, 2012
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 24, 2012
Objections to a Finding of Compliance	August 7, 2012
Response to Objections	August 21, 2012
Compliance Hearing - Location TBD	September 4, 2012 10:00 a.m.

SO ORDERED this 9th day of January, 2012.

_____
James McNamara, Board Member

_____
Nina Carter, Board Member
(Dissenting in part as to SEPA compliance)

_____
Margaret Pageler, Board Member

Partial Dissent of Board Member Nina Carter

I respectfully disagree with my colleagues' finding that Whatcom County is in compliance with SEPA. I found the County's argument faulty and unpersuasive. I also found compelling evidence that the County's comprehensive plan and development regulation amendments

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significantly impact the environment—even as compared to the 1997 Comprehensive Plan. The County should have conducted a new SEPA threshold analysis prior to adopting the Ordinance.

The County's faulty logic starts with its reliance on the last sentence in WAC 197-11-600(3)(b)(ii)…

> (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) *A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents. (emphasis added)*

The County argues they did not need to conduct another threshold determination because their 2011 Ordinance had ***less*** environmental impacts than those from their ***1997*** Comp Plan. The County claims that although the Planning Commission's version of the CP/DRs had "*even less"* development impacts than the 1997 CP, the County version still had "*less"* impact than 1997. The County's argument is flawed for several reasons.

WAC 197-11-600(3)(b)(ii) states that a threshold determination is not required if impacts are "covered by a range of alternatives and impacts analyzed in the existing environmental documents". The County only presented itself and the Board with a DNS that did not show a range of alternatives nor impacts of *changes from the 1997 plan to the 2011 Ordinance.* The County's rationale was that its 2011 Ordinance had less impact than those found in the 1997 Comprehensive Plan. However, the 2011 amendments to the comprehensive plan and development regulations warranted some threshold analysis to compare the existing plan with the changes proposed by the County in 2011. The question should not be: "What is the difference between the 2009 and 2011 proposals?" Rather it should have been: "What is the ***difference*** between environmental impacts allowed under the 1997 CP and those allowed in the 2011 Ordinance?" Only after this analysis, could the County claim a Determination of Non-Significance. Here, however, there is nothing in the record to demonstrate that the

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2011 Ordinance is likely to result in **less** environmental impacts than the 1997 Comprehensive Plan. The County's bare assertion that the Ordinance had less impacts than "if existing development patterns were to continue" was not substantiated. The County presented no evidence in the record. In fact, there is evidence in the record demonstrating "probable significant adverse environmental impacts."

One difference between the 1997 Comprehensive Plan and the 2011 Ordinance is the increased number of LAMIRDs in acreage, size, and intensity. The boundaries and intensity of use in LAMIRDs proposed in 2011 did not exist in 1997, otherwise the County would not be taking action now. Creating more LAMIRDs and designating increased uses within those LAMIRDs will have environmental impact – very probably significant and adverse. The County chose not to analyze the impacts of its proposed LAMIRDs.

The second difference between the 1997 Plan and the 2011 Ordinance, and the most egregious, is the "Rural Density Overlay"[368] which now allows more impervious surface than allowed in 1997. The density overlay for rural areas was not in the 1997 Comprehensive Plan. Nor was this overlay considered in the 1994 environmental impact statement used for the 1997 Plan. At a minimum, the density overlay needed a threshold determination analysis by the County particularly because it is fraught with problems. The problems with the overlay are not the Clallam County-like calculations and proximity requirements to nearby residents. No, the troublesome problem is that Whatcom County's overlay allows impervious surfaces increases from 10% to 20%. This occurs because the underlying zoning is changed from R-5A to RR-5A when applying the density overlay.[369] In an almost

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[368] The "Rural Density Overlay" is patterned after Clallam County's 2009 overlay which the GMHB sanctioned in Case No. 07-2-0018c. The overlay can be found in WCC 20.32.252 as it applies to "Rural Residential" Districts and in WCC 20.36.253 as it applies to "Rural" Districts. Although the Petitioners' complaints focused on Lake Whatcom, the overlay can be applied anywhere in the County, including in newly created LAMIRDs.

[369] Steve Hood, Department of Ecology, May 10, 2011. Mr. Hood points out the impervious surface increases and cites the Department's concerns from increased stormwater runoff and increasing phosphorus in Lake Whatcom.

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imperceptible alteration to a few numbers and letters, a rural parcel can now be covered with 20% asphalt instead of 10%. On the ground, this translates into a 5 acre parcel covered with 1 acre of asphalt and hard surfaces instead of ½ acre. Or similarly, on a 1 acre lot, now 20% of it can be used for driveways, buildings, sheds or other impervious surfaces. This increase clearly has "probable significant adverse environmental impacts."

The County should have mapped the location of all potential RR-5A parcels with density overlays and understood the range of impacts and alternatives to such a proposal. The County could then have made an informed decision about the potential impacts of twice as much water runoff from impervious surface throughout its rural area. If the County had conducted a threshold determination for the 2011 Ordinance, it could have decided which course to take if increased impervious surfaces affected stormwater drainage systems, combined stormwater/sewer systems, drinking water supplies, salmon habitat, wetlands, streams or rivers. Instead, rather than conduct a complete County-wide analysis, the County Planning Staff limited its analysis to a discussion of the number of lots that could qualify for the overlay in the Sudden Valley LAMIRD.[370] And, the County continued to rely on the 2009 DNS[371].

Specifically, for water runoff the DNS states:

> c. Water Runoff (including storm water):
> (1) Describe the source of the runoff (including storm water) and method of collection and disposal, if any, if known)
>
> **This proposal would reduce the potential for development in rural areas, likely resulting in construction of <u>less impervious surface</u> than if existing development patterns were to continue.**
>
> (2) Could waste material enter ground water or surface water?
>
> **This proposal would reduce the potential for development in rural areas, likely resulting in <u>smaller potential for contamination</u> than if existing development patterns were to continue. (emphasis added)**

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[370] Index R-007, Whatcom Planning and Development memorandum to County Council, April 5, 2011.
[371] Index D-025, Documents, May 1, 2009, SEPA-DNS, checklist.

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This DNS contradicts the County's own Rural Density Overlay program which allows twice the impervious surface when applied in RR-5A.

Other evidence shows the differences between the 1997 Comprehensive Plan and 2011 Ordinance. When the County increased the number, size and intensity of LAMIRDs in 2011, more vegetation removal will be allowed, not less as is described in #4 (b), page 7 of the DNS. Further the LAMIRD zones under the 2011 Ordinance include intense commercial/industrial designations that allow 90% impervious surface.

#4 What kind and amount of vegetation will be removed or altered?

> **This proposal would reduce the potential for development in rural areas, likely resulting in <u>less removal/alteration of vegetation</u> than if existing development patterns were to continue.**

Again, if the County is creating more LAMIRDs than existed in 1997, then these areas will contain more residential, commercial and industrial uses. More vegetative cover will be lost, not less as is stated in the County's DNS. Again, the County's rationale for not conducting a new threshold determination is contradicted by the statements in the DNS.

In sum, I would find the County in violation of SEPA, specifically WAC 197-11-600(3)(b)(ii), for failure to undertake a new threshold determination. I would remand Ordinance 2011-13 to the County to comply with the requirements of SEPA. In all other respects I concur in the Final Decision and Order and Order Following Remand on Issue of LAMIRDs.

Pursuant to RCW 36.70A.300 this is a final order of the Board.[372]

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[372] <u>Reconsideration</u>. Pursuant to WAC 242-03-830, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. <u>Filing means actual receipt of the document at the Board office.</u>

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RCW 34.05.010(6), WAC 242-03-240. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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